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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 474

ANGELO HERNDON, APPELLANT,

vs.

J. I. LOWRY, SHERIFF OF FULTON COUNTY, GEORGIA

No. 475

ANGELO HERNDON, APPELLANT,

vs.

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APPEALS FROM THE SUPREME COURT OF THE STATE OF GEORGIA

FILED OCTOBER 20, 1936.

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[fol. 1]

IN SUPERIOR COURT OF FULTON COUNTY

PETITION FOR WRIT OF HABEAS CORPUS—Filed October 28, 1935

To the Superior Court of Said County:

The petition of Angelo Herndon respectfully shows the following facts:

1. The petitioner is a citizen and resident of the State of New York, and is of the Negro race.

2. The defendant, J. I. Lowry, is a resident of Fulton County, Georgia, and is sheriff and ex-officio jailer of said county.

3. Petitioner is illegally and unlawfully detained and held in custody in Fulton County, Georgia, by the said J. I. Lowry as said sheriff and ex-officio jailer.

4. The sole claim of authority under which the said J. I. Lowry restrains your petitioner of his liberty, is a purported judgment, order and sentence of the Superior Court of Fulton County, Georgia, signed by Honorable L. B. Wyatt, Judge of the Superior Court, C. C., sitting in and for said county, on the 18th day of January, 1933, a copy of which is marked "Exhibit A," attached hereto and made a part hereof. The said judgment, order and sentence provides that petitioner be imprisoned in the Fulton County jail until a sufficient guard is sent for him from the Georgia Penitentiary, and that he be then delivered to said guard to be taken to the Georgia Penitentiary, or to such other place as the Governor may direct, and there be confined, at hard labor, for not less than eighteen years and not more than twenty years.

5. Such judgment, order and sentence were based upon petitioner's indictment (a copy of which is marked "Exhibit B," attached hereto and made a part hereof) and conviction of "attempting to incite insurrection" in violation of Section 56 of the Georgia Penal Code; said conviction being based upon evidence, a full statement of which is contained on pages 56 to 126, both inclusive, of the record

on petitioner's appeal in the Supreme Court of the United States, a copy of which is marked "Exhibit C," attached hereto, and made a part hereof.

[fol. 2] 6. There is nothing in the evidence upon which petitioner's conviction is based to show that there was a clear and present danger that violence or other unlawful acts would result from petitioner's action, or that petitioner advocated violence or other unlawful acts, or that violence or other unlawful acts would probably result from any of petitioner's action-, or that whatever violence or other unlawful acts might result from any of petitioner's actions would be likely to occur in the immediate or foreseeable future or at any given time.

7. Section 56 of the Georgia Penal Code purports to make criminal "any attempt to persuade or otherwise to induce others to join in any combined resistance to the lawful authority of the State." The crime denounced in this statute was defined by the Supreme Court of Georgia in its original opinion in petitioner's case as follows:

"Force must have been contemplated, but, as said above, the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor, would it be necessary to guilt, that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but it would be sufficient that he intended it to happen at any time, as a result of his influence, by those whom he sought to incite * * *."

The statute was reexamined upon the petition for rehearing, and the crime was further defined as follows:

"Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce."

The said statute on its face and as construed by the Supreme Court of Georgia does not require as a basis of guilt that violence or other unlawful acts be advocated; or that they should be the probable result of petitioner's [fol. 3] actions; or that any clear and present danger exists that violence or other unlawful acts may result therefrom; or that there be any dangerous tendency that violence or other unlawful acts would result therefrom; or that there be any intention that violence or other unlawful acts should result therefrom, either in the immediate or foreseeable future, or at any other specified time.

8. Petitioner's indictment, conviction and the judgment, order and sentence, aforesaid, are unconstitutional, illegal, void and of no effect, because they are predicated upon Section 56 of the Georgia Penal Code, which is unconstitutional and void in the respects and for the reasons set out below, and petitioner's detention under color of the aforesaid judgment, order and sentence is therefore illegal and unconstitutional:

(I) Section 56 of the Georgia Penal Code is unconstitutional, illegal and void by reason of the fact that it is in conflict with the Fourteenth Amendment of the Constitution of the United States in the following particulars:

(a) It denies and unduly restricts freedom of speech and of assembly.

(b) It is too vague and indefinite to provide a sufficiently ascertainable standard of guilt.

(II) Section 56 of the Georgia Penal Code, as construed and applied to the petitioner by the Supreme Court of *Court of* Georgia, is unconstitutional, illegal and void by reason of the fact that as thus construed and applied it is in conflict with the Fourteenth Amendment to the Constitution of the United States in the following particulars:

(a) It denies and unduly restricts petitioner's freedom of speech and of assembly.

(b) It is too vague and indefinite to provide a sufficiently ascertainable standard of guilt.

(III) Section 56 of the Georgia Penal Code, on its face, and as construed and applied to petitioner by the Supreme

Court of Georgia, is in conflict with Article One, Section One, Paragraph Three, of the Constitution of the State of Georgia, which provides that "No person shall be deprived [fol. 4] of life, liberty or property, except by due process of law," in the following particulars:

(a) It denies and unduly restricts the right of petitioner and others to freedom of speech and assembly.

(b) It is too vague and indefinite to provide a sufficiently ascertainable standard of guilt.

(IV) Section 56 of the Georgia Penal Code, on its face, and as construed and applied to petitioner by the Supreme Court of Georgia, is in conflict with Article One, Section One, Paragraph Fifteen of the Constitution of the State of Georgia, which provides that:

"No law shall ever be passed to curtail, or restrain the liberty of speech, or of the press; any person may speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that liberty."

(V) Section 56 of the Georgia Penal Code, on its face, and as construed and applied to petitioner by the Supreme Court of Georgia, is in conflict with Article One, Section One, Paragraph Twenty-four of the Constitution of the State of Georgia, which provides that:

"The people have the right to assemble peaceably for their common good and to apply to those vested with the powers of government for redress *of grievances by peti*tion or remonstrance."

9. Although the judgment and sentence, under color of which your petitioner is detailed as aforesaid, were affirmed by the Supreme Court of the State of Georgia on May 24, 1934, and a petition for a rehearing was denied by that Court on September 28, 1934, and an appeal to the Supreme Court of the United States was dismissed by that Court for want of jurisdiction, on May 20, 1935, and a petition for rehearing was denied by that Court on October 14, 1935, there has been no adjudication in petitioner's case by any court of the constitutionality under the Constitution of the United States, or of the State of Georgia, of Section 56 of the Georgia Penal Code.

Wherefore, petitioner avers that his restraint is unlawful, and prays this Honorable Court to issue a writ of [fol. 5] habeas corpus directed to J. I. Lowry, and whosoever may hold your petitioner in custody, commanding him to bring petitioner before this court at the time and place to be specified in the writ, for the purpose of examining into the cause and legality of petitioner's detention, and that thereupon your petitioner shall be granted a discharge from custody.

Sutherland, Tuttle & Brennan, Attorneys for Petitioner.

Duly sworn to by Angelo Herndon. Jurat omitted in printing.

[fol. 6] GEORGIA,
Fulton County:

To J. I. Lowry, Sheriff and Ex-Officio Jailer of Fulton County, Georgia:

You are hereby commanded to produce the body of Angelo Herndon, alleged to be illegally detained by you, together with the cause of the detention, before me on the 12th day of Nov. at 1 P. M. o'clock, then and there to be disposed of as the law directs. Let prisoner be held in custody of respondent in the common jail until further order.

Given under my hand and seal this the 28th day of October, 1935.

Hugh M. Dorsey, Judge, Fulton Superior Court.

Service of the foregoing petition and order acknowledged. October 28, 1935.

John A. Boykin, Solicitor General. James I. Lowry, Sheriff.

[fol. 7] EXHIBIT "A" TO PETITION

In Superior Court of Fulton County

No. 37812

THE STATE

vs.

ANGELO HERNDON

Verdict of Guilty and Recommend Mercy

Judgment

Whereupon, it is ordered and adjudged by the Court that the defendant, Angelo Herndon be taken from the Bar of this Court to the jail of Fulton County, and be there safely kept until a sufficient guard is sent for him from the Georgia Penitentiary, and be then delivered to, and be by said guard taken to said Penitentiary, or to such other place as the Governor may direct, where he, and the said Angelo Herndon be confined at hard labor for the full term of not less than Eighteen (18) years, and not more than Twenty (20) years, to be computed as provided in the Act approved August 27, 1931.

By the Court Jan. 18, 1933.

L. B. Wyatt, Judge S. C. C. C., Presiding. John A. Boykin, Solicitor General.

[fol. 8] EXHIBIT "B" TO PETITION

IN SUPERIOR COURT OF FULTON COUNTY

Indictment

The grand jurors selected, chosen and sworn for the County of Fulton, to wit:

Fulton Superior Court, Criminal Division,

Grand Jurors for July Term, 1932.

1. Fred McSwain, Foreman

2. Frank C. Owens,
3. Homer C. Hall,
4. P. A. Clark,
5. O. D. Witherspoon,
6. J. C. Slade, Jr.,
7. F. R. Coleman,
8. M. T. McCullough,
9. J. E. Varela
10 L. J. Smith
11. L. F. Green,
12. R. S. Paden,
13. J. E. Bennett,
14. C. L. Corlee,
15. R. S. Rust, Jr.,
16. J. W. Wray,
17. G. H. Turnipseed,
18. H. M. Peck,
19. A. Levy,
20. A. J. Collier,
21. C. B. Anderson,
22. H. H. Steed,
23. J. C. Bryant,

in the name and behalf of the citizens of Georgia, charge and accuse Angelo Herndon with the offense of Attempting to Incite Insurrection, for that said accused, in the County of Fulton and State of Georgia on the 16th day of July, 1932, with force and arms, did make an attempt to incite insurrection and did make an attempt to induce others to join in combined resistance to the lawful authority of the State of Georgia with intent to the denial of the lawful authority of the State of Georgia and with intent to defeat and overthrow the lawful authority of the State of Georgia by open force and by violent means and by unlawful acts, said attempt to incite insurrection intended to be manifested by accused by unlawful acts and intended by accused to be accomplished by acts of violence, said attempt to incite [fol. 9] insurrection being made by accused in the following manner to wit:

(1) Accused did call and did attend public assemblies and mass meetings in the homes of various persons whose names and addresses are to the Grand Jurors unknown and did make speeches to various persons to the Grand Jurors unknown, the purpose of said meetings and the purpose of said speeches being to organize, to establish and to set up a group and combination of persons white and colored, under the name and style of The Communist Party of America for the purpose of uniting, combining and conspiring to incite riots, to embarrass and impede the orderly processes of the courts and for the purpose of offering and making combined opposition and resistance to the lawful authority of the State of Georgia and for the purpose of overthrowing and defeating by force and violence the lawfully constituted

authority of the State of Georgia, all of which said meetings were held in various places and on various occasions which are to the Grand Jurors unknown.

(2) Accused did by speech and by persuasion, solicit and did attempt to persuade and solicit certain persons whose names are to the Grand Jurors unknown to combine with, to join and to confederate with and to become members of the Communist Party and The Young Communist League and to become members, agents, and parties to and of The Comumnist Party of America, to the intent and purpose of creating, offering, establishing and waging war against the lawfully constituted authority of the State of Georgia for the purpose of overthrowing the lawfully constituted authority of the State of Georgia by acts of violence and by revolution and establishing in the place of said lawfully constituted authority of the State of Georgia a new government known as United Soviets Soviet Russia, sometimes called and known as "The Dictatorship of the Propertyless People."

(3) Accused did introduce and did circulate and did cause to be introduced and circulated and did aid and assist in introducing and circulating certain booklets, papers and other writings with the intent and purpose of inciting insurrection, riot, conspiracy, uprising against the constituted [fol. 10] authority of the State and for the purpose of establishing combined resistance to and against the lawful authority of the State of Georgia, the names and contents of said books, papers and writings in part are as follows hereinafter, their full contents being of such a nature as that they cannot be copied in full in this indictment: Book A. "The life and Struggles of Negro Toilers" by Geo. Padmore, pg. 46. Therefore unlike their black brothers in Africa the negroes in the new world have had centuries of contact with the white capitalist civilization. But like the negroes in Africa they are subjected to the same barbarous methods of imperialist plunder and exploitations. • • • In no other so-called civilized country in the world are human beings treated as badly as these 15 million Negroes. They live under a perpetual regime of white terror, which expresses itself in lynchings, peonage, racial segregation and other pronounced forms of white chauvinism. • • • They are absolutely at the mercy of every fiendish mob in-

cited by the white landlords and capitalists. Banks of business and professional men make periodical raids upon the black countryside, where they lynch Negroes, burn homes and destroy the crops and other property belonging to the blacks. In most cases of lynching the negroes are burned to death after their bodies have been soaked in gasoline, while others are hanged from trees. On these occasions the entire white community turned out to witness the bloody spectacles, which were made "Roman Holidays."

And many other passages of similar import as on page 48 of said book, white people are accused of burning the homes, destroying crops, killing live stock, poisoning drinking water wells, murdering and lynching unarmed men, women and children.

Book B. "Party Organizer"—Special Penum Issue—Vol. V.—May-June, 1932, No. 5 & 6.—Issued by Central Committee Communist Party U. S. S. Same being a book of instructions to the organizers of the Communist Party and containing the details of methods of approaching factories, cotton mills, industrial plants and shops and containing instructions, doctrines, and teachings as to the methods of preparing and organizing strikes in the various shops, [fol. 11] industrial plants, cotton mills and other places where people work, containing information as to methods of training and developing and organizing workers and leaders in the Communist Party and in building up and bringing on strikes, riots, and revolutions.

Book C. "Communism and Christianism," by Wm. Montgomery Brown—"banish the Gods from the Skies and Capitalists from the Earth and Make the World Safe from Industrial Communism," in part as follows:

Page 6: "As the machinery of capitalist government including the armed forces of the nation, conserves the monopoly by the capitalist class of the wealth taken from the workers, the working class must organize consciously and politically for acquiring the powers of government, national and local, in order that this machinery, including these forces, may be converted from an instrument of oppression into the agent of emanicipation and the overthrow of privilege, aristocratic and plutocratic."

On pages 98 and 99 of said book: "The trouble with every reformatory socialism of modern times is, that it under-

takes the impossibility of changing the fruit of the capitalistic state into that of the communistic one, without changing the political organism; but to do that is as impossible as to gather grapes from thorns or figs from thistles. Hence an uprooting and replanting are necessary (revolution not a reformation) which will give the world a new tree of state.

Capitalism no longer grows the fruits (foods, clothes, and houses) which are necessary to the sustenance of all of the world. Hence it must be dug up by the roots in order that a tree which is so organized that it will bear these necessities for the whole world may be planted in its place.

Certain newspapers called the Daily Worker and The Southern Worker being the official organ of the Communist Party and containing various articles, criticising the courts of the United States and the various states and designed and intended to scatter and carry and implant in the minds of the people and citizens of Georgia hatred and contempt [fol. 12] against all constituted authority of the State with intent to the overthrow, denial and defeat of the lawfully constituted authorities of the State.

And all of the acts of the accused being done by accused with intent to formulate and to establish and to set on foot and to make effective combined resistance by force and violence in the lawful authority of the State of Georgia and to cause, produce and bring to pass the defeat denial, and overthrow by acts of violence, by unlawful means and by revolution, the lawfully constituted authority of the State of Georgia as above set forth and all of the acts of the accused were and are * * * contrary to the laws of said State, the good order, peace and dignity thereof.

John A. Boykin, Solicitor-General, Special Presentment Prosecutor.

AR—Jail.
Spcl.

Witnesses: J. J. Chester, F. D. Watson, 175 Decatur St., George Pounds, E. A. Stevens, c/o Solicitor's Office.

Sol's No. —. Clerk's No. 37812.

[File endorsement omitted.]

[fols. 13–13-56] EXHIBIT "C" TO PETITION

January 17, 1933, 9 A. M.

The following evidence was delivered before the jury:

F. B. WATSON, sworn in behalf of the State, testified:

Direct examination:

I am a city policeman. I know Angelo Herndon. I first came in contact with him last July, at the post office in this city, when I arrested him; at the time I arrested him he was in the lobby of the post office, here in the city of Atlanta; we had orders to go to the post office and watch a box, No. 339, I believe, and to arrest the one that came there after the mail; we were there something like an hour, this negro boy, Angelo, came up. He came to this box, taken his mail out and we put him under arrest; at the time he unlocked his box and taken the mail out of the box, he had with him at the time a paste-board box containing books, papers and pamphlets. I would recognize that box if I saw it; this box and its contents is what we taken off of him. I recollect examining the box after the arrest. I identify that box and those pamphlets as the contents of the box at the time of the arrest of this defendant. I searched him at that time. I saw him open this mail box, he had a key to the mail box; this looks like the key that he had; this straight key that looks like a door key, he told us that belonged to his room. After he was arrested, we went to his home, at the place he said was his home; he first taken us over on Coleman Street and he didn't live there; so we asked him where his room was at after we left this Coleman Street address, I forget the number, and he taken us on Hubbard Street; we found his room there on Hubbard Street. I said something to him about where he lived before we started from the post office with him; we found out that he didn't live on Coleman Street, because we went there and took him with us. He went with us to this address on Coleman Street; we went in the house and we asked a negro man did he know this boy; he said he knew him but he didn't live there; this boy was there; after that, we asked him what did he have to say to that, and he says he lived on Hubbard Street, and he

taken us to his place where he lived on Hubbard Street. When we got to the place on Hubbard Street we went in and asked who lived there; a woman by the name of Carrie [fol. 13-57] Jackson lived there; she said he roomed there, and showed us his room, and we went to his room and searched it; when she said that was where he lived, Angelo was with us and I heard Carrie Jackson identify him, and he heard Carrie identify him as connected with that room; we then searched his room and all his papers and things that were in his room. That place at the post office and on Coleman Street and Hubbard Street is in Fulton County, Georgia. I recognize this box and suit case as the two pieces we got out of his room; these newspapers, books, periodicals and such, they came out of his room. We talked to him about where he got those things and how he came into possession of them; before we started our conversation with reference to the documents and things, we did not make any threats against him or offer him any reward or any inducements. He told us they were sent to him from headquarters of this Communist Party, in New York. He told us he was working for someone by the name of Spence, that lived on Peachtree Street, but he didn't know the number. He did not at first discuss the nature of his work, he did later on; as to the nature or purpose of his work, he said he was sent here by this Communist Party as an organizer for them, representing this Communist Party; I don't remember now how long he stated he had been here. He did not say what he had done as such organizer. We ta-ken him them and locked him up.

Cross-examination:

I am a policeman. I arrested Angelo Herndon at the Post Office; at the time I arrested him he was taking mail out of a box; he got two or three letters out of the box; he didn't get anything else out of the box. I was not looking for Angelo Herndon before I went to the post office; we didn't know who we were going to catch at this box when we went there; we did not look for any one at all on Smith Street in connection with this particular case. When I got the alleged confession from Angelo Herndon, Mr. Chester was with me at that particular time. At that particular time we were at police station, in the detective department, on the second floor; we did not go up on the fourth

floor; there is no fourth floor there. I did not know there was a big electric chair stationed there; I never have seen it. Mr. Chester and myself searched Angelo's house; we did not have a warrant to do so, we searched him without [fol. 13-58] a warrant; we got these papers and magazines and periodicals. I didn't read them, I don't know what they are; they are there, you can look at them and tell what they are; I can identify them just by looking at them. We searched Angelo's person; we did not have a warrant to do so. I did not see Angelo Herndon circulate this material. I have never been to a meeting and found Angelo there; I have never heard him make a speech. He said he is a member of some kind of organization; Mr. Chester heard him say that. I did not carry Angelo Herndon and have him sit down in a big electric chair at the police station; I didn't know there was one down there; we carried him to the detective department on the second floor; when we got there we talked to him, that's all. Angelo Herndon said this material was sent to him from New York. I don't know that they were sent from New York. He got some mail from the post office; this was mailed in Atlanta—here's the mail we taken off of him, that he got out of the box. I did not see Angelo Herndon attempt any combined resistance to the State government or any of its officers; he was perfectly peaceful when I arrested him; he came to the post office box and was taking his mail out when I arrested him. This box that he had, we got that off his person at the time we went to the post office; he had that under his arm.

J. W. CLONTS, sworn in behalf of the State, testified:

I am a United States post office clerk in the city of Atlanta, and have been connected with the United States post office about six and a half years. The renting of boxes to individuals at the post office is my job entirely. We have an application here showing James Dicks rented box No. 339, January 8, 1931, and held same until September 30, 1932. I am not acquainted with Angelo Herndon; I wouldn't know him if I was to see him. I recognize this document here with this number 1201 on it; it is our serial number, 1201, issued for this box, No. 339; has my initials here as taking in the $2.00 for three months. The document

dated September 29, 1931, No. 1039, I recognized that, and it is for box 339. I collected the rent on the box. The document here, No. 1557, is our serial number, for box 339, that [fol. 13-59] was received by my superior officer, $2.00, and is for the same box, No. 339. Number 798, the 798 is our serial number for box 339, collected by myself, December 30, 1931. I see James Dick in the court room; he is sitting right there between the two gentlemen at the end of the table, the gentleman with the glasses, to the right, with the red striped tie on; that's the man I know as James Dick. I did not rent the box myself, but I collected the rents three different times; that is the man that paid me the rent on that box at the post office.

Cross-examination:

I am employed at the United States post office as clerk. That fellow over there with glasses on is the man that represented himself as James Dick; he did not always wear glasses. I'll give you the exact dates, how long he has been renting box 339; it was around January 8, 1931. The last time a payment was made on that box was for the quarter beginning July 1, 1932; it was made probably made in August, 1931, I believe is the date; the date on this receipt will show, but, as I remember, that's the last time I saw James Dicks, when he paid this rent. I did not rent the box myself, but a colored man who represented himself as James Dicks always paid the rent, I don't know who rented it.

F. B. Watson, recalled in behalf of the State, testified:

This folder was in the possession of Angelo Herndon at the time of his arrest; these post office rent receipts were in that folder at that time.

Cross-examination:

As to whether at the police station, on the last floor, they have installed there a big electric chair, a coffin and a skeleton, I don't know what is up there; I don't know anything about that. I don't remember telling Angelo Herndon when I was carrying him to the station house that I had been to 860 Smith Street looking for him. When Angelo

Herndon made the confession which I stated here, we were at the police station in the detective department, on the second floor. Mr. Chester was with me and heard it.

[fol. 13-60] Redirect examination:

The man right here with the red striped tie on is the one that gave me the name of Angelo Herndon at the time of his arrest, that is, the defendant in this case. We were in Fulton county, Georgia, when that occurred. He did not wear glasses at that time.

E. A. STEPHEN, sworn in behalf of the State, testified:

I am connected with the courts of Fulton county; I am one of the assistants in the solicitor general's office. I know a man who gave the name of Angelo Herndon to me; I talked with him after his arrest, in the grand jury room of this court house; my understanding was that he had just been arrested and brought in the court house and I questioned him in the grand jury room, one of the officers of the police department was with him at the time, but I don't recollect who it was; it was a police officer, or officers, brought him there, and one was in the room while I questioned him, I tried to refresh my memory and find who it was, but I don't recollect. It would be a hard thing to remember at this time what I said to him. I can give you the substance of the things; I did not make any promises to him or offer him any inducements to talk to me, and made no threats at all against him. As to what I talked about, if I may I will start at the beginning of my knowledge of this affair, and I state that on complaint from one of the county commissioners that he had received a certain scurrilous letter through the mail, which bore post office box No. 339, I called on the chief of police to have that box watched and the man who got the mail out of there taken in charge and questioned; the same day, Officer Watson, or Mr. W. B. Martin, I don't recollect which, brought this darkey, Angelo Herndon, to the solicitor's office and I talked to him in the grand jury room.

Attorney Davis: Mr. Stephens refers to the defendant as "darkey". Your Honor, we wish to remind the prose-

cution if they insist on using such opprobrious terms to the defendant, we will have to ask for a mistrial, because it is prejudicial to our case.

The Court: I don't know whether it is or not; but suppose you refer to him as the defendant.

[fol. 13-61] Your Honor, I wish to state that "negro" is the name this man referred to his race *by* in his conversation with me—these are captious objections.

Attorney Davis: But he says "darkey".

The Court: Well, refer to him as the defendant then.

I will refer to him as "negro" which is better; he gave the name of Alonzo Herndon—Angelo Herndon; he is the darkey with the glasses on, in the middle, the second one with the glasses on—he didn't have them on at that time; he stated that he came here from Lexington, Kentucky, where he was an employee of some coal mine company; he stated that a man by the name of E. Doran came there and got him interested in the Communist Party, and that he joined the National Communist Party at Lexington, Ky.; he stated that this coal mine association or organization that he belonged to was not communistic, but that he joined the National, the Communist Party at Lexington, Kentucky, at the instance of E. Doren—D-O-R-E-N, as he spelled it; he stated that he was sent to Atlanta to take the position of organizer for the Communist Party; now, when he was questioned by me as to what his compensation or interest was, he stated he was paid $10.00 a week, sometimes in cash and sometimes in money orders. At that time he stated to me that his duties were, as organizer for the Communist Party, to call meetings, educate or disseminate information regarding the party at these meetings, to distribute literature, to secure members for the organization and generally to work up an organization of the Communist Party in Atlanta. I don't recollect whether I asked him the question how long he had been here in Atlanta. He said he had held or attended two meetings, and then later when questioned about where they were held he designated the meeting places of three meetings that he had called and had been held, one of them on Auburn Avenue, I believe, one in the neghborhood of Tiger Flowers' home as he expressed it, and one on East Cain Street, I think it was. I made memoranda at that time of the things he said to me; I

made my memoranda so that wouldn't mean much to anybody else, because they were all private and made in as few words as possible. He did not state at whose homes these meetings were held; he stated the first meeting was held on Auburn Avenue in a vacant lot, the second was [fol. 13-62] held on the west side near Tiger Flowers' house, that is as definite as he put it; the third in a vacant house on Ellis Street, was his statement to me about the meeting; he did give me the names of persons that he said were members of the organization; said he only have five or six actual members at that time—actual members, as he put it; said the meetings were sometimes in vacant houses and sometimes in private houses; he gave the name of James Brown, of South Atlanta, along about Clark University, on the street turning off to the left, as one of his actual members that he designated, Willie Hendrick, in Decatur, on Atlanta Avenue, was one; Henry Brown, at the same address as James Brown; James Eberhardt, 860 Smith Street, as another, and there is one or two more that he said he couldn't recollect the names of. At the time the officer brought him there he brought that large paste-board carton down there filled with quite a quantity of literature; I have examined this one here and it appears to have the same periodicals and other things in it, and he brought a suitcase, which is the one there before you and appears to contain the same things that were there when I questioned him. I recollect quite well seeing this document at that time; I had a conversation with the defendant with reference to the authorship of that document; we had quite a little controversy about his statement that he wrote it. I told him I didn't believe that he did, and I thought somebody else wrote that; I didn't think he was capable of composing it; he insisted that he was the author of it himself, and two other documents, of which there are quite a number in the suitcase, or were at that time; I think those writings or those documents are here in that suitcase; there are two that he claimed he wrote himself, they don't seem to be in here; there were two different circulars, quite a quantity of each one of them; they are not here; they were in this case when I got it out Sunday afternoon; it was a pile somewhere around a couple of inches thick, when I got these out Sunday—here they are, they don't seem to be all

here; now, here is what I referred to, there are two different circulars here, I mean the composition of each is different from the other; we discussed the authorship of these and of these and of these two; he stated that he composed one or wrote one and sent his manuscript to Division Headquarters at Chattanooga and had it multigraphed and returned [fol. 13-63] to him, and I made a memorandum of the number that he said was returned to him for distribution; he stated that the first was drafted by himself and sent to Chattanooga to have multigraphed and they returned ten thousand of them and he had them distributed; he stated that the other of the two circulars was composed in Chattanooga, multigraphed there and seventy-five hundred, I believe it was—I have it here seven hundred and fifty, but I think he stated seventy-five hundred—were returned to him for distribution, and that he had the bulk of those distributed here in Atlanta. I couldn't tell you which one of these he said he wrote; he said the first one, and indicated at that time, but I didn't do anything to identify them. I don't see any date on either one of them so as to identify them as to any particular time and the contents of the thing, though, rather indicates to me that this one I hold in my hand, headed "Workers in Atlanta, Employed and Unemployed Negroes, Attention," was the second, because it refers to something that was done at the demand of him and his friends; and the first one, the one with the pictures on it, I think is the one he claims he wrote; I wouldn't be positive, one or the other he stated he composed, and that the other was written in Chattanooga and sent here to him—a manuscript of several pages, which he stated he wrote with his hand. This document here is the one I stated I had a controversy with him as to his writing; that is the one I said he insisted that he composed. He made these statements to me freely and voluntary; I want to state, further, among the other things he said in talking to me about this quantity of literature here in the suitcase and in the grip, a part of which you will notice has never been taken out of the wrapper—there are several packages like this—in questioning him what this was sent to him for; he stated for distribution at his meetings; the same with reference to many of the books that he had in these two receptacles there. He stated that he had called three meetings and undertook to tell *we* where he held them. I don't

recollect seeing this document here of July 10, but I will state that he stated to me that his organization of communist- at that time had only five or six active workers, I see that is the same information. I can't say that I definitely call at that time seeing this document entitled "Minutes of the Foster and Ford Club, July 8, 1932, Club 3," [fol. 13-64] and the meeting started at 8:30, I know, though. that the box and the suitcase were taken charge of by me and put under lock and key, and so far as I know they were never taken out until I got them out to use Sunday afternoon. He said that he called the meetings and held them and conducted the meetings; as to whether he said he made any speeches at any of those meetings, I don't know that the word "speech" was used.

Cross-examination:

I am Assistant Solicitor General, as I stated a few minutes ago; I am not interested in this particular case any more than I am in all cases which are indicted by the Fulton County Grand Jury. When Angelo Herndon made his confession, as I stated before, I don't recollect what officer it was who was present besides myself, but some member of the Atlanta police force. When Angelo Herndon undertook to tell me about the meetings, I don't know whether he ever finished or not. I don't know of my own knowledge any meetings with speeches, I didn't attend, if I had I would have had him arrested then; I am not particularly prejudiced to him according to my last statement, but if a man has violated the law, as an official of this State, I would have him arrested for doing it; he violated the law stated by Mr. Hudson in your presence in outlining this case, you know what it was, you heard it. It is not true that I had Angelo Herndon in the grand jury room attempting to get some information that I might indict him, I was undertaking to find out about his activities here. I was able to find out a good deal, by questioning him. As far as my personal knowledge is concerned, I would not state this confession was all the evidence we have against him; I know nothing personally. I know Angelo Herndon said he was the author of some of the leaflets. I have no personal knowledge of any of the acts that have been alleged to be committed in the indictment by the defendant.

* * * * * * *

F. B. WATSON, recalled in behalf of the State, testified:

[fol. 13-65] I am familiar with the location of Auburn Avenue, with reference to the limits of Fulton County; the entire street of Auburn Avenue is within Fulton County. I am familiar with the location of the house or residence in Atlanta that is known as the Tiger Flowers' residence, which is on Simpson Street, which is on the west side of the city of Atlanta, in the city of Atlanta, Fulton county. The whole west side of Atlanta is in Fulton county. I am familiar with Ellis Street, the entire street is in Fulton county. With reference to the city of Atlanta as a whole, all of Atlanta is in Fulton county, just a small area on the east side is in DeKalb county, all of the business section of Atlanta is in Fulton county, only this small area on the east side, a residence section, is in another county—the suburbs.

Cross-examination:

Every bit of material that was in the box I found on Angelo Herndon at the time I arrested him, I identify as the stuff in the box, every thing, even down to these little pencil stubs, I recollect these, every one, I did not write down the colors of the pencil, there was five or six pieces of pencils in the box, every little piece of booklet and leaflet, I identify it, I got the mental picture of it in my mind, so that I can identify everything there. I have never seen Herndon distribute any of the material I identify in the box, and have never been to a meeting where I ever heard Herndon speak. I have never seen him a single time resist an arrest; I have never seen him combine with any others, whether white or black, in resistanee of the State government.

Redirect examination:

I have examined the contents of this suitcase, and these boxes. I identify this bundle of what appears to be newspapers entitled "The Southern Worker," as having been found in the home or place where Herndon was living. I identify this batch of "Daily Workers," which you exhibit to me, as having been part of the documents found in his home at that time. I identify this package with this address, Mrs. Lula B. Jackson, 908 —— Avenue, Atlanta,

Georgia, and this title "Southern Workers"; this batch of newspapers entitled "Daily Worker," is some of the things [fol. 13-66] I found there at the defendant's residence; this additional batch of papers entitled "Daily Worker," "Central Organ Communist Party, U. S. A." and this batch of papers entitled "Daily Worker," and this batch entitled "Daily Worker"; I recognize this periodical, entitled "The Liberator" with the entry thereon, as one of the periodicals discovered at the defendant's home; this is another batch of newspapers entitled "Daily Worker, Central Organ of the Communist Party, U. S. A." found at the same time and place. I recollect seeing this document "Tornado Toll, 65 negroes, Atlanta World." What you now exhibit to me, which appears to be three or four copies of a paper entitled "Daily Worker" is one of the batches of papers I found at the same time and place; I recognize the "Recreator," as one of the articles found in the suitcase. I recognize this, entitled "American Press," as one of the periodicals that came out of the same place; this batch of books here, which seems to be in a serial order, the first Christian Supernaturalism, Volume 1, I recognize that, that was in the suitcase in his room; second Christian Supernaturalism, I recognize that; third, Christian Supernaturalism, Volume 3, I recognize that, that was in his room; fourth Christian Supernaturalism, I recognize that and Volume 5, that whole batch was in his suitcase, and this volume, the Bible, and this book of Christian Supernaturalism, Volume 6, Sociology, I recognize all of those; this pamphlet with the red leaflet entitled "War Preparations against the Soviet Union," is one of the periodicals found there. I recognize these papers, periodicals and documents as part of the literature I found at the same time and place. About this package with the address torn off, which appears to be a group of about three or four papers, called "The Young Worker," that was in his room with all the rest of these; this batch of papers addressed to Alonzo Eberhardt, 774-B Hubbard Street, Atlanta, Georgia, which appears to be a batch of newspapers entitled "The Daily Worker," I got those at the same time and place; I recognize the batch of papers entitled "Daily Worker," as part of the papers I found in the same place at the same time; this additional batch of the same papers "The Daily Worker," I recognize that as having been found at the same time and place; this

batch was there at the same time and place. These papers [fol. 13-67] that appear to be local papers, Georgian, Constitution and "Daily Worker," all of these local papers was together; I recognize this batch of papers called "Liberator," as part of the papers discovered there at the same time, and this batch of "Liberator"; this batch of Daily Worker and another batch of "Liberator," they were there at the same time and place; I recognize this other batch of papers entitled "Daily Worker," as found at the same time and place, and this "Liberator" also found at the same time and place, and this other batch of "Daily Workers," they were at his address, the same place; a copy of the Constitution for July 8th, and there was a batch of local papers in his room, that was one of the local papers that was in there, the Georgian, and this one, the Constitution, also this batch of Daily Workers, Young Workers and Daily Workers, they were in his room; another batch addressed to Alonzo Eberhardt, 774-B Hubbard Street, dated 10/3/29, Daily Workers, they were there at the same time and place; this wearing apparel, shirt, undershirt, socks, slip, book, toilet articles, those where in the suitcase at the time we searched his room. I don't know how many issues of these various newspapers that are in this batch in this box and suitcase, I didn't count them, but there was a batch of them that was all rolled up and wrapped up, some of them, and some of them was loose; I recognize these books here with white covers on them and this picture of William Montgomery Brown on the front, and two angels on the back, entitled "Heresy" they came from there, and this one; and this one; I looked at this batch of stuff here, this envelope, that was there at the same time and place I found these, the envelope with this address on it; this little card here entitled "Abolition" that was in his room; invoice of S. P. Richards Paper Company and I noticed this Red Bird tablet among the effects I found there at that time, all of that stuff was tied together with this batch of books, it has got some of the string on the books.

Cross-examination:

I'll just glance at the headline of the material I found there, I didn't read any of them, in the body of them. Some of the material in there is either radical or communistic in nature, I might have read a little of it. I remember Mr.

Hudson calling to my mind a certain publication called [fol. 13-68] "The Recreator," I found that in his room; I don't know whether that is of a radical nature, too, I didn't read it. I identified the keys that were taken off of Angelo's person at the time I arrested him, those were the keys to the post office box, one of them was; I don't know whether there was any other keys to that post office box, I taken that one out of his hand, and I don't know whether there was any duplicate keys held by any other person, I don't know whether Angelo Herndon was the only person that used that box, if there were any other persons that did use that box, I don't know whether they were black or white.

The State here rested.

PROF. MERCER G. EVANS, sworn in behalf of the defendant, testified:

I am a teacher at Emory University, in the department known as Economics. As to the degrees I hold, I have Batchelor of Science degree, Emory University, Master of Arts, and Doctor of Laws, Chicago University, I rank as Professor of Economics, just one of the Professors of the Economics Department, there are two Professors and two assistants. I was born at Gulfport, Mississippi; except for residences in colleges, I was there about twenty-three or twenty-four years. My undergraduate work was done at Emory University, my graduate work was done at Chicago. I have examined the books cited in the indictment against Angelo Herndon, all the way through.

As to whether I know the difference between revolutionary material and literature which isn't revolutionary, I have read rather widely, I suspect, in the field of economics, the theoretical economics, including a good deal of Anarchistic and Sociological or Communistic literature, which is, of course, on an economic nature. I have not published any books of any sort dealing with economic subjects, but I have articles; some of the magazines that have carried my articles are Annals of the American Academy of Social and Political Science, and the publication of the American Federation of Labor; the Annals of the American Academy is an economic publication of, I think rather high standing among the Professors of the Social

Sciences, while the publication of the American Federation [fol. 13-69] of Labor is a publication in the field of Psychology and social service, which is rather widely taken by Professors of Sociology, and Social Service Welfare and the American Federationist, the official monthly publication of the American Federation of Labor has frequent contributions in it of Professors of Sociology. I have read the books stated in the indictment.

I have some books in my possession here that are taken from Emory University Library, here are three books that come from Emory University Library, one from Carnegie Library, this first one is my Nicolai Lenin, entitled "Imperialism, State and Revolutionary," the second one is by Carl Marx entitled Christ, a prophet, addressed to working men, the third one is by Carl Marx and Frederick Ingalls, entitled "Communist Manifesto," Nicolai Lenin was a Bolshevik leader in Russia; that book came from Emory University Library; in other words that book is there in the library for the students use in Emory University. The students are at liberty to get these books and read what they wish.

Q. And it isn't the rules of Emory University that they should think what they wish?

Solicitor Hudson: That is irrelevant and immaterial, Your Honor.

The Court: I rule that out. If Emory University is guilty of anything, we will try them, I think even if Emory University had actually attempted to incite riot, it wouldn't be material in this case, it is a question of what this defendant has done.

I don't believe I have any other books from Emory University Library, I have one from the Carnegie and a few from my own.

I have no other books from the Carnegie Library, that's all.

Cross-examination:

I have been a member of the faculty of Emory University; this is my ninth year. I don't have this pamphlet "The Communist Position and the Negro Question." I don't have this document here, "receipt book." Emory University is a denominational school; I do not belong to the denomination that founded that school, but to another

[fol. 13-70] one, Congregationalist, in other words, I am not a Methodist, and am not an Episcopalian, I am not a Communist, and I am not a revolutionalist; I am acquainted with what is known as the Communist of Soviet Russia, or the Soviet Union, of the present form of governments in the nation of Russia, that is a government which succeeded the Kerensky government, which succeeded the former Czarish government; that was brought about by a revolution, putting out the Czar and the assassination of the Czar and his family came later, not necessarily as the result of a revolution.

As to the Russian Revolution, history so regards it, that there was a revolution, the Czarish government overthrown, the Kerensky government took charge and after about six months another revolution of bloodless character in which the present regime succeeded the Kerensky government. I wouldn't attempt to dispute that, as an historical fact, what I have just said; I stated that as being an historical fact. I think I read that little paragraph in this fine print at the bottom of the page, page 6 of this document here. I stated that I hadn't seen this, this pamphlet "The Communist Position on the Negro Question," I haven't read the book. I don't think I read that in the platform of the Communist Party on which Ford and Foster ran this year in the United States for election for President and Vice-President; I think I read the Communist platform, I am not sure; yes, I read the Communist platform in the summer that was put out by the National Magazine. I have not read this little pamphlet here "An Appeal to Southern Young Workers," and especially the back part of it here beginning with No. 7 on down. I have been to Russia, I was over there this summer, I spent in Russia about two weeks, I think.

Angelo Herndon, defendant, made his statement as follows: Gentlemen of the Jury: I would like to explain in detail the nature of my case and the reason why that I was locked up. I recall back about the middle part of June in 1932, we remember that the Relief Agency of the City of Atlanta, and also the County Commission and the City Government as a whole, they were cutting off relief of unemployed workers, both white and colored, in the city of Atlanta, and we know there were citizens that suffered unemployment, hundreds and thousands of negroes and whites

each day looking for work and there was no work to be [fol. 13-71] found during those days. Well, the Unemployed Council of Atlanta which has connection with the Unemployed Committees of the United States, through the organization of the Unemployed Committees—the committee after this relief had been cut off and after over 23,000 people right in Fulton County and Atlanta, Georgia, the Unemployed Committee—which is the policy of the Unemployed Committee not only in Atlanta but throughout the whole United States, started to organize the negro workers and organize the white workers together on the same basis, because of the fact that their interest are the same, because the white workers were starving and because of the fact that the negro workers was starving, and the unemployed committee realized this, in order for the white workers to get relief, and in order for the negro workers to get relief, they both will have to get together and forget about the question of racial discrimination, forget about this question of the white skin and the black skin, because both are starving and the capitalistic class will continue to prey on this tune of racial discrimination, that the negro skin is black and yours white, and therefore, the negro is no good, and therefore they were bound to prey on this tune in order to keep the negro and white divided. So the policy of the Unemployed Committee was to organize negroes and whites together on the basis of fighting for an unemployment relief and unemployment insurance at the expense of the State. The Unemployment Committee had issued those leaflets after this relief had been cut off, which meant starvation on the part of thousands here in Atlanta; the Unemployment Committee issued those leaflets calling upon negro and white workers to attend a meeting down at the courthouse building on a Thursday morning, I forget the exact date. This was as the result of statements handed out in the local press by County Commissioners that there was nobody in the City of Atlanta starving, and that if there was, to bring them to their office and they would be willing to look into the matter. This was a statement mainly by Commissioner Hendrix. Well, the Unemployed Committee of Atlanta pointed out in this circular that there was unemployed negroes in the city of Atlanta and there was actual starvation on the part of these workers, so the Unemployed Committee called for a demonstration in this courthouse

building, about the middle part of June, and when this [fol. 13-72] committee came down to the courthouse, Commissioner Hendrix, it happened so he wasn't present that morning, and there was unemployed white women with their babies almost naked and without any shoes to go upon their feet, and there was negro women with their little babies actually *actually* starving for the need of proper nourishment and all that, which had been denied them by the county of Fulton and State of Georgia and city of Atlanta as a whole. Well, these particular negro workers, and the white workers, they came down to the commissioners' office to show that there was starvation in the city of Atlanta and that they were in actual need for food and proper nourishment for their kids, which they didn't receive. Well, these workers went up to the County Commissioners to show them these particular facts, and I think Commissioner Stewart was in at that time, and so that to divide the negro and white workers, they taken the white workers on the inside of the room and left the negro workers on the outside, this in order to continually play on the tune of racial discrimination, in order that they would be able to block the fight that the negro and the white workers were carrying on—a determined fight to get relief. So they were successful in getting the white workers inside of the commissioner's room and closing the door in the face of the negro workers and pointing out to the white workers "Well, the county hasn't any money, and of course, you realize the depression and all that but we haven't got the money." We know this, after the white workers cut out their discussion, they knew the county did have money, but they were using it for their own interest, and not for the interest of the negro workers or the white workers, either way; and they talked to the white workers some considerable time, the white workers came out, they had just about as much results as the negroes did—only a lot of hot air blowed over them by the commissioners, which didn't put any shoes on their little babies' feet and no milk in their stomach to give their babies proper nourishment. Well, these men, the white workers were in the same condition that their negro brothers on the outside were in—no one disputed the fact they did keep the negro workers on the outside. Well, as the result of this, in spite of the fact that they had come out in published statements that there

[fol. 13-73] was no money in the county treasury to provide unemployment relief for the negro and white workers, still the next day after the demonstration the county commissioners voted $6,000.00 for unemployment relief, mainly because of the fact it was shown in this demonstration that for once in the history of Atlanta and the State of Georgia, negro and white did join together and did go to the commissioners and demand an unemployment insurance because of the fact that they had worked in the city of Atlanta, have worked in different industries, different shops and different other industrial concerns located in Atlanta for their whole life, doing this work, building up the city where it is at the present time. Now, because that time, when they were in actual need of this money to hold their bodies together, and when they came before the State and county officials to demand something to hold their bodies together, they were denied it, so the policy of the Unemployed Council is to organize these workers and demand these things. They have worked as slaves, and they are entitled to those things, whether they get them or not. Of course, the workers will get them if you ever organize for them. And as the result of this demonstration after those circulars had been distributed through the City of Atlanta, from the solicitor's office he had two detectives stationed at the post office to get any one who came to get mail out of this box 339. Well, on Monday, July 11, 1932, I went up there to get mail from this box, because of the fact I was a member of the Unemployed Committee and also an organizer for the Unemployed Committee. I went up there to get mail, and these two detectives, Mr. Watson and Mr. Chester, was stationed at the instructions of the Solicitor General, to lock up whoever came up there, because of the fact they had organized unemployed workers, negroes and whites, of Atlanta, and forced the county commissioners to kick in $6,000.00 for unemployment relief. So, for this I was locked up and carried to the station house and held eleven days without even any kind of charges booked against me at the station house. The charge was "suspicion." Of course, they knew what the charges were going to be, but still in order to hold me in jail—give me the dirtiest kind of treatment that you can describe and all sort of inhuman treatment, they held me there eleven days [fol. 13-74] without even any charge whatsoever until my

attorney filed a writ of habeas corpus demanding that they place charges against me or turn me loose. This was about the 22nd of July, I still hadn't been indicted; there had been three sessions of the grand jury meetings, and my case had been before them each time, and the grand jury still hadn't indicted me, because of the fact they just wanted to hold me in jail for some time simply for organizing the white and negro worker, demanding food to keep their bodies together. Upon this basis they held me in jail all that time. So at this habeas corpus hearing, the judge ordered if I wasn't indicted the next day by 2:30 to turn me loose. Of course, the solicitor assured the judge there would be an indictment by next day, which, of course, there was, and ever since then I was transferred to Fulton county tower, where I remained there close to six months—I think the exact time was five months and three weeks. But I want to describe some of the horrible conditions I was forced to go up under in the Fulton county tower there. I was placed in a little cell there with a dead body and forced to live in there with this dead body because I couldn't get out of the place—couldn't even walk around, stayed locked up all the time. This particular fellow, his name was William Wilson, who also fought in the Spanish American war for the American principles, as we usually call them and they had him there on a charge of alimony, so he died in there as the result of the rotten food given to all prisoners in there, and for the want of medical attention. Well, the county physician just had refused to give this particular prisoner any kind of attention whatsoever, so after three days sickness, as the result of this, this prisoner died and I was forced to live in there with this dead man until the undertaker came and got him out. These are just some of the things that I had to go through in jail; after that I was sick myself, because of the fact that the food they gave me in there, I couldn't agree with it, and not only me but hundreds of other prisoners who can't eat the food. For instance, you have peas and beans for one dinner, and probably you have it three times in the week, and at times you probably find rocks in there and you crack down on them with your teeth, you don't know what it is, and you spit them out and there it is. They have turnip [fol. 13-75] greens, and just as they are pulled up out of the ground and put in the pot, that's what you have to eat,

otherwise you don't live. Next morning they have some grits—looked like they were baked instead of boiled, a little streak of grease running through them, and about a couple — of this fat back, that's what you have to live on; and as the result of this particular fight, I was forced to live in jail five months without trial. My lawyer put in demand, demanding trial, and every time the State would postpone the case, because of the fact that they knew those workers in the city of Atlanta were starving and when they come and arrest Angelo Herndon and put a charge of attempting to incite insurrection—which carries the death penalty—because of the fact that he did organize negroes and white workers into a demonstration which forced the County Commissioners to kick in with $6,000.00, they locked up Angelo Herndon on such charges; but I can say this quite clearly, if the State of Georgia and city of Atlanta think by locking up Angelo Herndon, of course, there will be more Angelo Herndons to come in the future, because of the fact there are thousand- of negro workers starving and thousand- of white workers starving and if they want to break up this organization they can go and lock up everybody in the organization and place an insurrection charge against them, then they will be able to prosecute them, because these are the basic reasons the State of Georgia had me locked up, because of the fact they knew the workers were starving and they knew the workers needed relief, and they know now the workers are going to organize and get relief. Of course, we know it will take fights and all that to develop these particular suggestions on the part of the negro and white workers. So, after being in jail all of this long time—there was continual efforts by the defense attorneys in my case to get a trial, the case was set for trial several different times and each time the State wasn't ready for trial, for no reason still, they put it off; and after staying in there so long, I was sick in there several weeks, which, of course, I asked for aid from the county physician and was refused that; the county physician came and looked through the doors and says "What's the matter with you?" I says "I'm sick, can't swallow water, my chest up here is tight and my stomach absolutely out of [fol. 13-76] order, seems I am suffering with ulcers or something," the county physician says "Oh, there's nothing the matter with you, you're all right;" I says, "I know my con-

dition, I know how I am feeling;" he says "You'll be all right." So, through friends, I was able to get some medicine in there which did do me good, because after eating all that rotten fare and stuff in there they give you I had indigestion in there, and couldn't drink even a drink of water, so after I taken that medicine I began feeling better, and I got out on Christmas Eve day on bond, my bond once was $3,000.00, and they raised it from that to $5,000.00, and from that up to $25,000.00, just in order to hold Angelo Herndon in jail all the time, and by holding Angelo Herndon in jail all the time will stop these demonstrations, which made the County Commissioners kick in $6,000.00 for the unemployed. Well, they can hold this Angelo Herndon and hundreds of others, but it will never stop these demonstrations on the part of negro and white workers who demand a decent place to live in and proper food for their kids to eat; but I want to say also, that the policy of the Unemployed Committees is to carry on a constant fight for the rights of the negro workers, because of the fact that the Unemployed Committees realize that unless negro and white workers are united together, they can't be able to get this relief, because it is to the interest of the capitalistic class to stir up all of this race hatred between negro and white workers and keep it going all the time, tit for tat, and the negro running after the white workers, and the white workers after the negro workers, and at the same time they are able to keep their eyes on the negro workers' conditions and the white workers' condition. The policy of the Unemployed Committees is to expose these things. Though there was no negroes in the United States, there would still be a racial question, probably it would be the Jews, or the Greeks, or something like that, because it is their interest to bring up all of these things, so that they can get a good profit out of the working people. But it happened that the negroes skin is black, and the white workers' skin is white, and they attempt to use this so that they can oppress fifteen million people—Well, it is a great amount of profit that we can get from the ranks of the working class, and at the same time have in mind that the white workers are [fol. 13-77] going to run the negroes, therefore, we may continue to keep our system," or of probably robbing the working classes of what they could produce. I don't have

to go so far into my case, no doubt some of your jurymen sitting over there in that box right now are unemployed and realize the situation of unemployment, and you tramp the streets day in and day out looking for work and can't find work—well, you know it is a very serious problem and the future looks so dim until you don't know what to do, and at times you go nuts and want to commit suicide or something, but the Unemployed Committee points out to the negro workers and the white workers that the solution is not in committing suicide, that the only solution is not in continuing to fight, the negro workers fighting the white workers, and the white workers fighting the negro workers, but in organization, and we will be able to get better conditions, because it is then left up to the negro workers and to the white workers to get these better conditions. Now, why do I say that? I say it because of the fact that the capitalistic class, it is to their interest to keep the ranks of the poor working class down all of the time and get as much profit from them as they possibly can. So, on the other hand, it is to the interest of the negro and white workers to get as much for their work as they can—that is, if they happen to have any work; unfortunately, at the present time there are millions and millions of workers in the United States without any work, and the capitalistic class of the State government, city government and all other governments, they have taken no steps to provide relief for those unemployed, and this question is left to the white workers and the negro workers, they will be able to organize and demand the right to live, which they are entitled to, because they have built the country up to where it is at the present time, and therefore, they are entitled to these particular things. Not only are they entitled to them, but it is their right to demand these things; so, when the State of Georgia and the city of Atlanta raised a question of inciting and attempting to incite insurrection, or attempting to overthrow the government and all of that, well, I can say, no matter what they do with Angelo Herndon, no matter what they do with the Angelo Herndon in the future, this question of unemployment, the question of unity between negro and white [fol. 13-78] races, isn't a question that happens to fall out of the sky, but it has intimately affected us and we can't deny them. We know the system we are living under is on the verge of collapse; no matter what system we are living

under, it has developed to its highest point and comes back—for instance, you can take a balloon and get so much air in it, and when you get too much it bursts; so with the system we are living under—of course, I don't know whether that is insurrection or not, but the question, it has developed to its highest point and it is back, and therefore, it is our duty and our rights to organize ourselves and demand these things, otherwise, we will continue to be starved, continue to be thrown out of our houses because of the fact we are not able to pay rent, and because of the fact that they have no jobs to give us and we are willing to work if they give us jobs, so why not give us unemployment insurance at the expense of the State and the employers, not at the expense of the humanitarians, the few who are still employed, but from the right class of people who has robbed and taken everything from the ranks of the negro and white workers, it is their duty to contribute insurance by special taxation from the Federal Government and also by the State government, that these funds are to be used for the relief of the negro and white workers.

T. J. CORLEY, sworn in behalf of the defendant, testified:

I live at 1600 Emory Road, Northeast. I am an assistant professor of economics at Emory University; my home is in Comanchee, Texas, I was born in Texas. I have been teaching at Emory, this is my second year, I have never been in Russia. I am not a communist, and am not sympathetic with communism in its entirety. I find elements within communism with which I agree, but before I could answer that question, as to whether I am sympathetic with communism, I should have to ask you to define communism. I am acquainted in some detail with the platform of the communist party in the last November election; I remember off-handedly some of the planks in the platform.

Q. Will you name one or two of them?

As I recollect, self-determination in the black belt was not one of the planks in the communist platform in No- [fol. 13-79] vember. Unemployment insurance at the expense of the State and the capitalistics was in the platform;

I am sympathetic with that plank, I approve of that part of the communistic doctrine.

I am familiar with the platform as a whole, I would recognize it if I saw it, with some changes. I don't have the platform memorized, I couldn't repeat it item for item, I am familiar with all of the principles contained in it. The first plank is unemployment and social insurance at the expense of the State and employers; second, against Hoover's wage cutting policy; third, emergency relief for the poor farmers without restrictions by the government and banks, exemption of poor farmers from taxes and from forced collections of rents or debts; fourth, equal rights for the negroes and self-determination for the black belt; fifth, against capitalistic power, against all form of political oppression of the rights of workers; sixth, against imperialism, etc. I am in sympathy with part of those. The communist party was on the ballot in November, some of the States, I believe, excluded it, a considerable number of States had it on their ballots, the communist party was on the ballots in this State. I did not vote the communist ticket.

Q. However, if you had wanted to express your approval in the ballots, by use of the ballot, of the Ford and Foster candidates, you would have placed your name on the communist ticket, wouldn't you?

A. I don't believe I understood the question, will you repeat it?

Cross-examination.

I said this was my second year with Emory. There is no little communist party over there at the University that I know of. I was not in the delegation of Emory professors which came to the solicitor's office after Angelo was indicted, I have never been to the solicitor's office. I have seen this little pamphlet here entitled "The Party Organizer," I haven't gone through the thing in detail, I have just seen it, I know some of the things inside of it. I was born in Comanchee County, Texas. I belong to the Christian Church, as it is sometimes called, the Carmelite Church. I stated that I was acquainted with the Communist platform.

[fol. 13-80] Q. And this was read off to you: "Equal rights for the negroes; self-determination in the black

belt;" you are able to tell us what that means, aren't you, Doctor?

A. No, sir.

I did not testify that I understand the planks in the communist platform, I said I was familiar with the party platform. As to whether I will now swear that I understand it, the question which you raise, I should say, is a question of opinion and not of fact, there are some questions which are capable of an answer in fact, others are questions of opinion, I could give you my opinion of what it means. As to whether it takes an opinion to tell the court and jury the ordinary Decatur Street meaning of self-determination, I think it is a matter of opinion, there are several techniques by which self-determination might be expressed, for instance, there might be a plebiscite vote, or there might be an election for representatives to a body—there are a number of ways in which self-determination would assert itself, and I think it is a matter of opinion. I have not read this little pamphlet entitled "The Communist Position on the Negro Question." I would be glad to give the court and jury my understanding of the expression "Equal Rights for Negroes," the meaning of the phrase, as I see it, it is this: These rights are equal rights, are equal rights under the law.

Q. You understand that to mean the right of a colored boy to marry your daughter, if you have one?

Attorney Davis: We object to that question on the ground that it is irrelevant and immaterial and calls for a conclusion of the witness.

The Court: He has him on cross-examination and that's a part of the language in the platform.

Attorney Davis: There is nothing whatever in the platform about intermarriage.

The Court: The same quotation he is reading there is in the platform, as I understand.

Attorney Davis: You overrule my objection, Your Honor?

The Court: I overrule the objection; go ahead.

A negro doesn't happen to have the right to marry my daughter, under the laws of this State. I don't know how many States there are in the Union where they do have that right.

[fol. 13-81] Q. Did you know there are twenty States in the United States where the two races can intermarry or mix?

A. No, I didn't know that, I knew there was a number, I didn't know how many.

Attorney Davis: I don't see what that has to do with this particular case, Your Honor, we object to it as irrelevant and immaterial.

The Court: He has the witness on cross-examination, and he has testified that he knows what that phrase means, and he has a right to determine how much he knows about it, on cross-examination—it isn't his witness.

That expression, "Equal Rights to Negroes," does not mean full political, social and racial equality. I have not read this little pamphlet here, "An Appeal to the Southern Young Workers," I have not seen or studied this little pamphlet here. I did not know that one of the demands of the communist party for the colored man is the confiscation of the lands, taking away from the white people who own the land, their lands and houses. I did not know that another one of the demands in the South was the right to establish an independent nation in what is known as the Black Belt, or the Southern and Southwestern portion of the United States, including the right to secede from the United States Government; I did not know that was a part of the communist platform last year, 1932.

Q. Did you know that was stated in the speech made in May, I believe, this year, by C. A. Hathaway, nominating James W. Ford, of Alabama as a vice-presidential candidate to run with William Z. Foster of New York, for president; did you know that?

A. That it was in his speech?

Q. Yes.

A. No, I didn't know that, I don't know that I have seen his speech.

Attorney Davis: Your Honor, in this particular case, the witness testified he was qualified, and knew something about the platform, but Mr. Hudson is continually asking about questions that are not in the platform, he is continually asking him about questions that he didn't testify that he knew anything about; and we ask that those questions be ruled out and stricken from the record.

[fol. 13-82] The Court: Well, he has him on cross-examination, and he has asked if he knew these things were said by the candidate of the communist party—an advocate of the party—he has him on cross-examination and I think he has a right to do that. I overrule the objection.

(The defendant here rested.)

W. T. TURNER, sworn in behalf of the State, testified:

I am engineer and steward at the jail; I have charge of the preparation of the food for the prisoners at the jail; my duties are to see that they are properly fed, about the maintenance of the building in the way of repairs and everything, in other words, the jail is the place for the sheriff's prisoners, he is the custodian of the prisoners, and I look after the cleaning and care and the upkeep of the building. I will say no rotten food is given the prisoners, we buy the best beans that can be bought, baby lima beans, white beans and California black eyed peas, we don't serve a native grown pea, that is, a Georgia grown pea, at the county jail. A man named Wilson did not die as the result of rotten food and lack of medical attention at the jail. I wouldn't want to say I remember the name exactly, but a man named Wilson did die at the jail, we were looking at the records a while ago, and if I remember correctly, it has been a little bit better than two months ago. Just as soon as we find they are dead, we notify the undertaker and they come and get him immediately, as soon as they can get them out. There has been no complaint of men dying from lack of attention that I know of, I think I would have known if there had been. I remember Angelo Herndon and recall his period of incarceration; he was not subjected to any inhuman treatment whatever, he was not subjected to any rotten food, I remember going to him and talking to him personally about his food, he wrote a letter out to a friend, I went to him and says, "Angelo, aren't you getting the same food the rest of the boys in the cage are getting?" He says, "yes;" I says "well, what's wrong with it?" He says, he wanted something, of course, that the county didn't furnish; I says "well, we can't give you any extra variety of food, we give you good wholesome food here, the same as I eat myself

[fol. 13-83] and every prisoner in the jail gets the same food," and he says to me then well, the food was all right, but he wanted something different; members of the sheriff's force eat the same food furnished the prisoners, and I myself eat the same.

Cross-examination:

I do not confine myself while at the jail solely to food. I have other duties to perform. Whenever I feel like it, I eat at the jail, this morning, I ate breakfast the same as the prisoners did. There is not one iota of difference between the preparation of the food for the prisoners and food for the officials, unless I buy it myself, ham or something like that; I mean, at times, I go out and purchase food and come back and cook it myself, and we allow prisoners the same privilege, too, whenever they want anything we'll order it for them if they have the money, if they want a chicken or ham or eggs or anything like that, if they tell me, "Mr. Turner, will you get me a chicken?" I'll say "yes," and get it and prepare it for him, we furnish anything they want. I had a conversation one day with Angelo Herndon, he did not express to me any objections to the condition of the food, he said the variety of the food, he wanted something different, and I told him "we give you stewed fruit, stewed peaches or prunes, if the doctor says give you milk, I'll give you milk, he did not tell me that the rocks and foreign matter in the food was such that he couldn't eat it. I do not know of any inhuman treatment at the jail, there is none, unless a man—if you call it inhuman, whereby if he violates the prison rules, he is locked in a cell to punish him that way, we do that sometimes where they are unruly, that's the form of punishment, but putting them in the cell, locking them in the cell to themselves for twenty-four hours, but they are fed their food right on. I have never heard of any official at the jail exercising inhuman treatment to any prisoner. I spend anywhere from eight to sixteen hours a day at the jail. In the jail there is no discrimination whatever between negro and white prisoners, as to treatment, of course, they are segregated, they are put in cages, and the negroes get the same treatment the white prisoners get, every cage is constructed alike, there is no difference. I have had objections to the condi-
[fol. 13-84] tions of the food, for instance, we may serve

collards or cabbage, well, they don't like it, don't like cabbage, I won-t hear so much from the colored as from the whites, we served collards two days in succession last week, some of the white boys didn't like it. If I find one dead, I immediately notify the jailer, he notifies the undertaker to come and get him, and as soon as the undertaker comes he is taken out of the jail, I would consider that a part of my duties, or any other officials. I make rounds of the building every day, I don't make rounds particularly to see whether there are dead bodies or not; it isn't possible for me to tell in every instance after a person dies, how quickly his body is gotten out of the jail, that depends on how long it takes the undertaker to get there; it isn't possible for a person to die there and two or three days expire before his body is obtained, there has never been a case of that kind; the system at the jail that makes that impossible is because, as I stated, as soon as we find there is a dead body in one of the cell blocks we notify the undertaker immediately and he comes and gets it in just a few minutes. The cells and conditions there are always sanitary, as much as possible, at times, in some of the cell blocks, it isn't as clean as others, we have to depend on the man himself largely to help us keep the place clean. Every cell is ventilated exactly alike; the ventilation pipes on the east wing, it comes from the north and south, and on the west, it's the same way, on the north and south, it comes from east and west. I have never known of any case where a prisoner's health was impaired due to unsanitary conditions of the jail, of course, we don't claim it is a hotel, we claim it is a county jail and kept in as good condition as it can be kept, considering its age; as to whether it is now unfitted for the use of prisoners, considering the age of the jail, there's lots worse in the country, and there are some jails that are more modern.

Redirect examination:

The jail has been overcrowded with prisoners during the past six months, the normal capacity of the jail is about, I would say, 480, that includes families' quarters and all; a few days ago they had 486, it has been up to maximum capacity for the past few months, and sometimes over [fol. 13-85] the maximum amount, take first and second, east it is for colored, three and five for white, and some-

times we have to really double them up in one of the east wings, or maybe the west wing. There are available for prisoners a county doctor and a government doctor. Doctor Blalock, is the county doctor, and I forget this government man's name, he is a new man, he has been down there a couple of months. Doctor Blalock, is supposed to make a round of the building every day, he comes every day, sometimes he comes twice, visits them and gives treatments, goes from cage to cage and says "Who wants to see the Doctor?" and if I am in one I say "I do," and if it is necessary they take me up to the clinic on the fifth floor, and administers to me the best he can, every man there can seen the doctor if he wants to let the doctor know he wants to see him. We have a hospital ward at the jail, we have a clinic there, a room fourteen feet square.

Recross-examination:

We have a hospital ward—we call it a hospital ward but it is seldom used for that purpose now; where a colored man gets sick we try to segregate them the best we can, we have a cell block there set aside for that purpose; there is no colored hospital ward, this hospital ward, as I say, is seldom used for sick people, it is used for men who sleep there, we have a room, as I say, called a white hospital ward, but the clinic, the white fellows use, and colored fellows use it, to-; I said to Mr. LeCraw that we had a hospital ward but it is seldom used for sick people, as I stated, it is used for the boys making time, serving sentences in jail, they occupy this room to sleep in. What I call the white hospital ward is not the same thing I call the negro hospital ward, it is a cage; white prisoners and colored get the same treatment, as far as the clinic is concerned, they go to the clinic, and the doctor takes the white and colored to the same clinic and waits on them. As to the places they are kept, the white prisoners and the colored prisoners are kept in two different types of places, the colored in the cage and the white in what we call the white hospital ward. For your benefit, I may say, if the judge will pardon me, we have gone so far as to take the colored fellows there when they were sick and in need of [fol. 13-86] attention and put them in the white hospital ward, put beds in the hall and everything, and wait on them

the best we possibly could, there has never been a colored man in that jail that suffered for want of attention if we knew it, he gets as good treatment as the white man does. We have a white hospital ward and have a cage used for sick negro prisoners, they have to be very sick to be put in the white hospital ward, a white prisoner, if there is room for him there, he is taken there, he generally goes to the Grady Hospital; as to how sick you have to be to be put in the white hospital ward, that's up to the doctor; I know that the doctor, when he comes there, is supposed to treat every prisoner that needs treatment, and to the best of my knowledge, he does, I'm not with him all the time, I say he is supposed to, and to the best of my knowledge, he does. As I say, it is part of my work, or any official's, to point out prisoners to be treated, if a man needs medical attention, to do the best we can, any man who needs medical attention or anything else.

R. N. Holland, sworn in behalf of the State, testified:

I am the jailer in charge at the jail of Fulton county; I am there from 7:00 in the morning to 3:00 and 3:30 in the evening. A man named William Wilson did not die there from rotten food and want of attention, I recollect the instance of the death of William Wilson; I came to the jail on that morning, on September 10, I think it was, they called me from home, I told them to send his body to Howard's undertaking place, the man making his rounds, he found the man, the doctor was waiting on him, Doctor Blalock, county doctor, can tell you the same thing; he hadn't been dead but a few minutes, something like that, I do know it was not absolutely any period of days. As to whether or not rotten food is given to the prisoners, I went down there Sunday morning, early. Saturday night I was there and ate my breakfast Sunday morning in the kitchen, and I should say it is not rotten, because I ate my breakfast there last Sunday morning, the same food, sausage and biscuit and coffee, I ate breakfast in the jail Sunday morning, because I was called there Saturday night at 12:00 o'clock. I recollect the period that this defendant, Angelo Herndon, was a prisoner there at the jail; he [fol. 13-87] was treated just like any other colored prisoner in the Fulton county jail, they are all treated the same, he

was treated just like any other colored man, up in what we call the first east and is fed *the rest* as the rest of them; he was fed, I should say, just ordinary common food, just good food like they serve to the prisoners all the time.

Cross-examination:

I am acqu-inted with the conditions of the jail in general, I should be, I have been there sixteen years. I remember Wilson dying at the jail, I remember when they had called me at the jail when he died; they got his body out of the cell back there in the cell block where he died, I don't remember the number of the cell; I don't know whether there was anybody else in the cell w-h*en* him; I didn't go back there to look and see, because he was moved out when I got there. I did not tell the defendant, Herndon, that he had better get out of town after he got out of jail, I had no reason for telling that. I absolutely did not make any threats of any sort about Herndon, I don't think I ever spoke to the man more than two or three times while he was there. With regard to the approximate size of the cells, there's two sleeping bunks in the cell, the exact size I don't know, but there's plenty of room in there, there is a commode in there, some of them, and wash basin, the commode is inside of the cell, all of the cells—well, I won't say every cell, either, there might be some cells where they haven't. The food there is not rotten, as I say, I ate breakfast myself there Sunday morning, the same food the prisoners were served. They all receive the same treatment. We don't make any distinction except in the case of murder, a fellow sentenced—the electric chair, we put them in some of the smaller cages. As to whether we have a white hospital ward, we have a ward where a lot of trusties sleep, but where a man is sick, sometimes we put him there. We do not have a colored ward, we used to have but we don't now, I would say it was somewhere back in 1925 or 1926 that we had one, we don't have a hospital ward there because we don't have occasion to have them. After a prisoner dies, his body is gotten out very quickly by the undertaker, as soon as we call there is one there in less than thirty minutes; I couldn't tell you how much time transpires between the death and the time we call the [fol. 13-88] undertaker, because when a man makes his round with the flashlight he goes to every cell block, at least

every hour; it is possible for him to walk by a cell and see a man on the cot and think he is sleeping when he is dead, a man died in jail last week, and a man sleeping right -side of him found him dead—the man wanted to give him his coffee and called for him, and the man lying in bed went and shook him and he said "Why, this man's dead," but the man was up at 4:00 o'clock when they called the prisoners to come out, and that was 6:00 o'clock, and he was in Howard's undertakers place before seven o'clock. It could not be possible for a man to die there and a day or so elapsed without some deputy sheriff or somebody knowing he was dead, no such thing as that is possible; it is possible for a prisoner to send word that—cell-mate is dead, but I have got men that don't do anything else but go around them cell blocks, not looking for dead bodies especially, but looking around there to see what is going on. If I have any objections as to the unsanitary conditions of the jail, I investigate it, I always investigate, if I got any complaint whatever, I got a complaint from this man you are speaking about, from some foreign organization, that he wanted ham and eggs for his breakfast, I got that and I went and told him he would be served his breakfast just like anybody else, just whatever the jail feeds. As to whether the jail food is at all times free from such matter that would make the prisoners ill, I know it is good food, there is no fancy food, there is no fashionable stuff cooked for anybody; they buy good flour, as I stated, I had breakfast there Sunday morning, I eat there very often, I eat my dinner time and time again, day in and day out, dinner is set down there in the kitchen, the same food; I do not go out and buy food and bring it back to be cooked, if I go out and get food at all, I go out and get cooked food, I don't go out and get cooked food often, I do whenever I want to, and I can tell you another thing, if a prisoner in there has got something he wants cooked, we'll cook it for him. This fellow Wilson died there, if he had been bad off we would have moved him out and put him somewhere else and taken care of him, we do that, and put men to stay with them night and day, we put them sometimes in the hospital room—there's a room up there—a man bad off, and a doctor looks at him and says he is bad off, I move him; this man, Wilson, wasn't bad off, he died very sud-
[fol. 13-89] denly; the doctor is here, he will tell you what he died with, my recollection is it was heart failure.

DR. J. C. BLALOCK, sworn in behalf of the State, testified:

I am a county physician of Fulton county. I have been a practicing physician since 1921; I was stationed at the Grady Hospital for 20 months prior to my present work, and after that I was a practicing physician here in the city of Atlanta, in the general practice since that time; I have been county physician two years the 1st of January. I go to the jail usually every day; describing a typical day's work on my trip to the jail, we have a man that goes around each cell and checks up on the number sick and when I got around, if there's any of them that isn't able to go to the hospital, then I prescribe for them in the cell, if they are able to get up there, they are carried up there and I prescribe what treatment is necessary, if not, I treat them in the cell, and if a man is sick, there is a man in charge, which is another prisoner, of course, if he is bad sick or anything we think mighty serious, of course we send this patient out to the hospital, but some lingering illness which he has had for several months before he came in, he is cared for by another prisoner that is in charge of this department, we try to pick one intelligent enough to handle the cases. I recollect the incident of a prisoner named William Wilson who died in jail; I had been treating him several days prior to his death; he had a heart condition, he had a condition what we call a hypertension and arteriosclerosis, which is a hardening of the arteries, and had a valvular heart disease, he had consulted me for that; I think my record shows September 10, I was called to the jail when he died and I saw his body; I had treated him the afternoon before for this heart trouble.

Cross-examination:

I make a round practically every day, I don't go every day but I did at that time, because we had some illness. I make a round practically every day, and then I have a man in the jail who checks up each and every day, and makes report to me; he isn't a doctor himself; as to whether [fol. 13-90] it is possible for a man to be ill on one of the days I am not there and died for the lack of medical treatment, it is possible a man can die standing up, if that answers your question, it isn't ever any time they can't get me within a very short period of time, in fact, I can be

gotten more quickly than they can get their home, because my office keeps in touch with me and I make as much as three and four trips a day, I make a round in the morning, and less than two hours—I have gone I will be called back to see the same man, I make a call each day to the front, and generally make a complete round of the cells every day, but it is checked up every morning that goes by, every cell is checked, and the question is asked if there is anybody sick, if there is anybody sick officers pass all during the day, I think about a period of about two hours, something like that, and if there is anybody sick the officer goes and makes a trip to the front office and the front office calls me. This man that makes the round in my absence and reports to me is not a physician. I remember the case of William Wilson; I treated him before he died, I saw him several times, I don't remember just how many days, but I saw him several times, almost from the time he came in until he died, I would say, two weeks or three weeks, I know it was that long, because I saw him every day for several days. He died from heart disease, I mean, that's what my diagnosis was, of course, I'm not infallible. No autopsy was performed on the body, I asked if they wanted one and I got an answer no—I don't know who it was. As to whether I would consider Wilson a pretty sick man up to the time he died, I consider anybody that has got a heart disease pretty sick, but they go along ten or fifteen years with it, or probably longer than that, I have observed some longer than that myself. As to whether my treatment during the two weeks he was there aided him or bettered his physicial condition or prolonged his life, the answer to that is the death, I would say not, but he said he felt better, he told me that, at least, but that isn't necessarily that he was better, I treated him in his cell. There is not a hospital or negro ward, we have places they put them in, it depends on the condition they are in, we have four or five there that isn't able to be up, and we have a place to keep them and keep a man with them night and day, he takes care of them and gives them the medicine whatever I prescribe at the time. I did not consider Wilson's condi- [fol. 13-91] tion a dangerous thing, I didn't know what was going to happen, that is the case with any heart condition, and I told him what could happen. I treated him in the cell because he was able to be around, he had an entire bunk by himself and had a man to care for him. I

don't think the white hospital ward would lend itself to the bettering of the physical condition of sick white prisoners, I have patients in practically every ward over there; as to whether it is an improvement over the regular cells, the only thing I can say would be, you might figure it would be a little better air on account of better ventilation, but I don't consider it worth any more to the patient; fresh air is vital to anybody; it isn't more vital to a sick man than to a well man, I think fresh air is vital to anybody, or at least, helpful, but I don't consider it more vital to sick than to well people, it couldn't be; if I had my way about it personally—in one of them— I would as soon be in one of the cells as in the hospital, as I say, there is a little bit better ventilation, that's the only thing that you could say is better about it; I stated I consider it is a better condition, so far as air, than the rest of the cells. As to whether there is no negro ward which has even that advantage, I think the one we have right now, I don't think there is much difference in the ventilation; it isn't fixed up exactly the same way the white hospital ward is, there isn't any other cell fixed up exactly like you would call the hospital ward, that is the only one we have, but as far as the sick man is concerned, it is just as good, I don't see any difference. I did not think Wilson was sick enough to be put in the hospital ward, not any more than he was, I don't see that I could have improved on the place he was in, that is, inside of the jail; he had as much air as he needed, I just spoke of the ventilation and the light, I think he would get enough air any place he would have went. Two prisoners is as many as I have ever seen in one cell room, they are double-decked—two beds, one can be up and one down. The jail is not overcrowded, as far as the sick department is concerned. One man was living in the same cell with Wilson, I don't know who he is, I don't take the name, except of the sick, that's the only names I take.

Redirect examination:

There is a drug supply there at my disposal all the time, anything that I want, I have a regular drug room, about as [fol. 13-92] well equipped a room as you'll find anywhere in Atlanta. If I need any drugs in the treatment of a prisoner, I don't have to go anywhere for them, I have them there.

Recross-examination:

The prisoners don't have to pay for any medicines; we give them pills whenever they need them, we average about 5,000 pills per month, they don't pay for anything, nor for their medical attention.

Testimony closed.

* * * * * * *

IN SUPERIOR COURT OF FULTON COUNTY

No. 37812

ANGELO HERNDON

vs.

STATE OF GEORGIA

Indictment for Attempting to Incite Insurrection

Brief of the Documentary Evidence—Filed July 6, 1933

The State introduced the following documents which were identified by witness F. D. Watson as being documents found in the personal possession of defendant Angelo Herndon, in a box under his arm, at the time of his arrest:

Document No. 1

Receipt Book, containing two receipts filled out with pencil and 36 blank receipts. The first receipt filled out is as follows: "July 8th, 1932. Received from Julius Klarins Three and 00/100 dollars for subsidy, $3.00. Angelo Herndon."

The second receipt bears the same signature and is the same as the first except the date, which is: "July 5th, 1932."

Document No. 2

Receipt Book, containing five receipts filled out with pencil, nine blank receipts, and 33 stubs, some filled out and some blank stubs. Receipts are as follows:

[fol. 13-93] "6/20, 1932. Received from International Workers Order Five and no/100 dollars for relief work. $5.00. Otto Hall."

"6/26, 1932. Received from M. Zipper Two & 00/100 dollars for 10-104 and 1-100 stamps. $2.00. Angelo Herndon."

"June 19th, 1932. Received from Julius Klarins, etc., Three 100/100 Dollars for subsidy. $3.00. Angelo Herndon."

The next receipt is same as last one above except date—June 26, and is signed "Angelo Herndon." The 5th receipt is signed "Otto Hall" and is same as the Otto Hall receipt (above) except date—July 5, 1932.

Document No. 3

Membership Book No. 51088 of Communist Party of the U. S. A., being a booklet of 16 pages, with various printing upon all pages, and the first page filled in with ink, as to names and dates. The first page of this one is filled out so as to be as follows:

"Communist Party of the U. S. A.

(Section of the Communist International)

Membership Book No. 51088

for

Name: Walter Heathers.
Date admitted to Communist Party: 7/10/32.
Entered Revolutionary Movement: —.
District 17, City Atlanta.
Section 2. Shop or Street Nucleus: —.
Signature of member (in ink): — —.
This book was issued on (date) 7/10/32.
Nat Ross. (Signature of District Organizer and Party Seal.)

No Party Membership Book valid unless it has party seal stamped on.

Issued by the Central Committee, C. P. U. S. A.

(Stamp is affixed, which reads as follows: "Unemployment Initiation Communist Party of the U. S. A. 10¢ Stamp 10¢.)

[fol. 13-94] (This and the other membership books which follow, being Documents numbers 4 to 10 inclusive, all have the following printed matter therein:)

"Extracts from the Statutes of the Communist Party of the U. S. A.

§ 3—Membership

"1. A member of the Party can be every person from the age of eighteen up who accepts the program and statutes of the Communist International and the Communist Party of the U. S. A., who becomes a member of a basic organization of the Party, who is active in this organization, who subordinates himself to all decisions of the Comintern and of the Party, and regularly pays his membership dues.

"4. • • • (relates to transfers from one unit to another).

"6. Every member of the Party who is eligible to be a member of a trade union must become a member of the union to which he is eligible.

§ 4—The Structure of the Party

"1. The Communist Party, like all sections of the Comintern, is built upon the principle of democratic centralization. These principles are:

(a) Election of the subordinate as well as the upper Party organs at general meetings of the Party members, conferences and conventions of the Party.

(b) Regular reporting of the Party committees to their constituents.

(c) Acceptance and carrying out of the decisions of the higher Party committees by the lower, strict Party discipline, and immediate and exact applications of the decisions of the Executive Committee of the Communist International and of the Central Committee of the Party.

(d) Any Party committee whose activities extend over a certain area is considered superior to those Party organizations whose activity is limited only to certain parts of this area.

[fol. 13-95] (e) The discussion on basic Party questions or general Party lines can be carried on by the members only until the Central Committee has decided them. After a decision has been adopted at the congress of the Comintern, the Party convention, or by the leading Party com-

mittee, it must be carried out unconditionally, even if some of the members or some of the local organizations are not in agreement with the decision.

"2. The highest authority of each unit of the Party is the general meeting of Party members, conference or Party convention.

"3. The membership meeting, conference or Party convention elects the leading committee which acts as the leading Party organ in the interim between the membership meetings, conferences or conventions and conducts the work of the Party organization.

§ 5—The Party Nucleus

"1. The basis of the Party organization is the nucleus (in factories, mines, shops, etc.) which all Party members working in these places must join. The nucleus consists of at least three members. Newly organized nuclei must be endorsed by the leading committee of the section in which the shop nuclei are organized.

"3. Party members who cannot be immediately affiliated with a shop nucleus shall join temporarily the street nucleus in the section of the city in which they reside, until it shall be possible to create a shop nucleus in the factory.

§ 12—Party Discipline

"1. The strictest Party Discipline is the most solemn duty of all Party members and all Party organizations. The decisions of the CI and the Party Convention of the CC and of all leading committees of the Party, must be promptly carried out. Discussion of questions over which there have been differences must not continue after the decision has been made.

§ 13—Party Dues

"1. Each applicant for membership shall pay an initiation fee of 50¢ (Unemployed 10¢), which shall be receipted [fol. 13-96] for by an Initiation Stamp furnished by the CC. Fifty per cent of the sum of the Initiation Stamp shall go to the National Office and 50% to the District Office.

"2. Each member shall pay dues weekly approximating 2% of his earnings, which shall be receipted for by dues stamps issued by the Central Committee. Dues Stamps shall be issued in five categories, as follows:

"All members receiving $15 per week wages or less (including housewives and working farmers) pay 10¢ dues weekly.

Over $15 and up to $25 per week wages shall pay 25¢ dues weekly.

Over $25 and up to $30 per week wages shall pay 50¢ dues weekly.

Over $30 and up to $40 per week wages shall pay 75¢ dues weekly.

Over $40 and up to $50 per week wages shall pay $1.00 dues weekly.

Members receiving over $50 per week wages, shall pay in addition to the regular $1.00 per week dues, additional dues (special tax) at the rate of 50¢ for each $5.00 (or fraction) of their weekly earnings above $50.00.

"3. The district organization shall purchase all dues stamps at 50% retail price; the district shall sell at 80% retail price to Sections; and the Sections shall sell them at 90% retail price to units.

"4. All local or district assessments or collections are prohibited except by special permission of the Polcom. Special assessments may be levied by the national convention or the CC. No member shall be considered in good standing unless he purchases such special assessment stamps.

"5. Members unable to pay regular dues on account of unemployment, strikes, illness or similar reason, shall pay 2 cents per week.

"6. Members who are four weeks in arrears in payment of dues cease to be members of the Party in good standing. Members who are three months in arrears shall be stricken from the rolls. No member of the Party shall pay dues in advance for a period of more than six weeks.

[fol. 13-97] "What is the Communist Party?

"The Party is the vanguard of the working class and consists of the best, most class conscious, most active, the

most courageous members of that class. It incorporates the whole body of experience of the proletarian struggle, basing itself upon the revolutionary theory of Marxism and representing the general and lasting interests of the whole of the working class, the Party personifies the unity of proletarian principles, of proletarian will and of proletarian revolutionary action. (From the program of the Communist International.)

"We are the Party of the working class. Consequently, nearly the whole of that class (in time of war and civil war, the whole of that class) should work under the guidance of our Party, should create the closest contacts with our Party. (Lenin.)

"On Discipline

"He who weakens, no matter how little, the iron discipline of the Party of the proletariat (especially during the period of dictatorship), effectually helps the bourgeoisie against the proletariat. (Lenin.)

"The Party as the best training school for working class leaders, is the only organization competent, in virtue of its experience and authority to centralize the leadership of the proletarian struggle, and thus to transform all non-Party working class organizations into accessory organs and connecting belts linking up the Party with the working class as a whole. (Lenin.)"

The above described book also contains four pages with places blocked off for stamps, these pages being headed: "Membership Dues for 1932. The book also contains four pages blank except for the heading: "Assessment Stamps." The book also contains two pages headed: "Transfers" with blank places to enter: "Granted from——" and "Accepted to——."

Document No. 4

Membership Book No. 51069 of the Communist Party of the U. S. A., being a booklet of 16 pages, with printing therein the same as Document No. 3, except the first page, which is as follows:

[fol. 13-98] "Communist Party of the U. S. A.

(Section of the Communist International)

Membership Book No. 51069

for

Name: A. O. Leathers.
Date Admitted to Communist Party: 7/10/32.
Entered Revolutionary Movement: ——.
District 17, City Atlanta.
Section 2. Shop or Street Nucleus ——.
Signature of Member (~~in ink~~): —— ——.
This book was issued on (date): 7/10/32.
Nat Ross. (Signature of District Organizer and Party Seal.)

No Party Membership Book valid unless it has party seal stamped on.

Issued by the Central Committee, C. P. U. S. A.

(Stamp is affixed, which reads as follows: "Unemployment Initiation Communist Party of the U. S. A. 10¢ Stamp 10¢.)

Document No. 5

Membership Book No. 51092, being 16 pages, same as Documents No. 3 and 4, except that it is made out in the name: Nannie Leah Young.

Document No. 6

Membership Book No. 51093, being 16 pages, same as Documents No. 3 and 4, except that it is made in name: Wm. Harris Leathers.

Document No. 7

Membership Book No. 51090, being 16 pages, same as Documents No. 3 and 4, except that it is made in name: Mary Heed.

Document No. 8

Membership Book No. 52648, being 16 pages, same as Documents No. 3 and 4, except that it is made in name: Anna Mae Leathers.

Document No. 9

Membership Book No. 51089, being 16 pages, same as Documents No. 3 and 4, except that it is made in name: L. B. Benefield.

Document No. 10

Membership Book No. 51091, being 16 pages, same as Documents No. 3 and 4, except that it is made in name: Willie Wyatt.

[fol. 13-99] Document No. 11

Membership Book No. 27168, being 16 pages, the printed part of which is the same as Documents No. 3 and 4, but the first page of which is as follows:

"Duplicate

Communist Party of the U. S. A.

(Section of the Communist International)

Membership Book No. 27168

for

Name: Otto Hall.
Date Admitted to Communist Party: March, 1921.
Entered Revolutionary Movement: 1920.
District 5, City, Covesdale.
Section Cove. Shop or Street Nucleus ——.
Signature of Member (in ink): —— ——.
This Book was issued on (date) Duplicate.
Carl Price. (Signature of District Organizer and Party Seal.)

No Party Membership Book valid unless it has Party Seal stamped on.
Issued by the Central Committee, C. P. U. S. A.

(Rubber-stamp seal and symbol is imposed thereon, in red ink, part of the seal being illegible, but which is partly legible as follows: "Communist Party U. S. A.")

On two of the pages headed "Membership Dues", in this book, twelve yellow stamps have been fixed, reading:

"Exempt Stamp, Communist Party of the U. S. A." On the first page headed "Transfers", in this book, appears an entry:

"Granted from Pittsburgh, District 5.
"Accepted to: Dist. 2, New York."

Document No. 12

Three pads of certificates of contribution to the Communist Party presidential election campaign fund, with stub attached to each certificate, a sample of said certificates and stubs being as follows:

[fol. 13-100] (Here follows photolithograph of Certificate, side folio 13-100A)

Each of the pads contain 42 such certificates, similar to the above except as to the amount in large red figures in the center. Some of the certificates are for $5, some $1, some 50¢ and some 25¢. The reverse side of all said certificates is as follows:

Send this slip with the money to the one that gave you this book.

Received $ _____ from

Name _____

Street _____

City _____ State _____

for the $100,000.00
Communist Election Campaign Fund

Book No. 1990

Received by _____

No. 1990

FOR WORKING CLASS UNITY IN THE ELECTION CAMPAIGN! AGAINST THE HUNGER AND WAR OFFENSIVE OF THE CAPITALISTS!

FOR PRESIDENT

Wm. Z. FOSTER

COMMUNIST ELECTION FUND CERTIFICATE

This is to certify that

5.00

has contributed the face value of this certificate to the election campaign fund of the Communist Party of the U.S.A.

Wm Z Foster

James W. Ford

FOR VICE PRESIDENT

JAMES W. FORD

FOR THE WORKERS TICKET - CANDIDATES OF THE COMMUNIST PARTY - - AGAINST THE CANDIDATES OF THE BOSSES!

(Reverse)

[fol. 13-101] The outside of each of said pads, in Red paper, is as follows:

"Vote Communist and Support the $100,000.00 Communist Election Campaign Fund

"Vote Communist for

1. Unemployment and Social Insurance at the expense of the State and employers.

2. Against Hoover's wage-cutting policy.

3. Emergency relief for the poor farmers without restrictions by the government and banks; exemption of poor farmers from taxes and from forced collection of rents or debts.

4. Equal rights for the Negroes and self-determination for the Black Belt.

5. Against capitalistic terror: against all forms of suppression of the political rights of the workers.

6. Against imperialist war; for the defense of the Chinese people and of the Soviet Union."

(Inside the Red cover appears the following:

"This book is valuable. A serious responsibility rests with you in accounting for the certificates contained in this $100,000 Communist Election Campaign book.

"For all money received by you, give a certificate, which is the official receipt to the contributor. Fill in the information required on each stub.

"Send the money with the stubs to the place from which you received this book. It is very important to do this promptly because we want to publish the names of all contributors in the Daily Worker."

On the back of each of said pads, in Red paper, is the following:)

"Every Worker a Communist Campaigner

Collect Everywhere

"Every dollar collected is a bullet fired into the boss class. The success of this campaign depends upon your efforts. Read and Subscribe to the Daily Worker."

[fol. 13-102] Document No. 13

A booklet entitled: "The Communist Position on the Negro Question."

On the outside cover, in addition to above title, appears a map of the United States of America, under which is the following:

"Self-Determination for the Black Belt"

The map has a dark belt or strip appearing in it, beginning with a portion of Arkansas and Louisiana and extending eastward through the middle of Mississippi, Alabama and Georgia. Inside the State of Georgia this "Black Belt" includes a strip from west to east, the counties within the belt on the northern edge being Troup, Coweta, Fayette, Campbell (old) Clayton, Rockdale, Newton, Morgan, Clarke, Oglethorpe and Elbert. From this tier of counties the Belt extends southward through the middle of Georgia to and including the counties of Dooly, Wilcox, Dodge, Laurens and Johnson.

Leaving Georgia northeastward, the "Black Belt" extends through a substantial portion of South Carolina, North Carolina and Virginia, ending at the Chesapeake Bay.

A photographic reproduction of said map and booklet cover is as follows:

(Here follows photolithograph of side folio 13-102A)

THE SOUTH ON THE NEGRO QUESTION

EQUAL RIGHTS FOR NEGROES

SELF-DETERMINATION FOR THE BLACK BELT

[fol. 13-103] On page 28 of this pamphlet appears the following:

"Our Demands in the South

"In the South, the first must be fearlessly developed against the thievery and robbery of the Southern capitalists and landlords; against their whole system of enslaving the Negroes based on Jim-Crowism and lynch terror. We must fight there not merely against inequality, but against the whole system by which this inequality is enforced.

"In the first place, our demand is that the land of the Southern white landlords for years tilled by the Negro tenant farmers, be confiscated and turned over to the Negroes. This is the only way to insure economic and social equality for the tenant farmers.

"Secondly, we proposed to break up the present artificial state boundaries established for the convenience of the white master class, and to establish the state unity of the territory known as the 'Black Belt,' where the Negroes constitute the overwhelming majority of the population.

"Thirdly, in this territory, we demand that the Negroes be given the complete right of self-determination; the right to set up their own Government in this territory and the right to separate, if they wish, from the United States.

"Around these demands for the Negroes, as I have outlined them here—with the revolutionary white workers in the very forefront of the struggle—the unity of white workers, small farmers and the Negro masses can and must be established.

"Not Promises; But Action

"But the Negroes have listened to many promises. Every political faker has promises equality and freedom. The white workers can win the confidence of the negro masses, not by promises, but by action. We must ourselves be in the forefront of the struggle for negro rights. We must ourselves jump at the throat of the persecutors of the negroes. We white workers, in the first place, must enforce the demand—'Death to the Lynchers!'

"The Communist Party has demonstrated in action that it does not merely speak for Negro rights; it is everywhere in the forefront of the actual struggle to force the grant-

ing of real equality now for the negro people. This has [fol. 13-104] been shown in the Scottsboro case; it has been shown in hundreds of other cases in all sections of the country.

"Comrades, in conclusion, as a further step in convincing the masses of the revolutionary sincerity of the Communist Party in the fight for equality for the Negro people, I propose that we endorse as our candidate for Vice-President, a negro worker. I have a candidate to propose—a candidate long active in the revolutionary working class movement—an ex-serviceman, a member of the Trade Union Unity League, a member of the Communist Party. This candidate knows the lynchers. His own grandfather was lynched by the southern bosses. He has long been a most active fighter against the enslavement of his people.

"I wish to nominate for Vice-President of the United States, as our running mate with William Z. Foster, this leader in the struggle for the emancipation of the toilers—white and negro—James W. Ford of Alabama."

(The above is incorporated in the booklet as a part of the nominating speech of C. A. Hathaway, "delivered at the National Nominating Convention of the Communist Party proposing James W. Ford of Alabama for Vice-President of the United States.")

(On the first page of this booklet appears:)

"The documents presented in this pamphlet are the result of the very best and most careful thought, study and experience of our Party. The correct line of our Party on this question has been hammered out in years of bitter struggle—struggle with the enemies of Bolshevism. • • •

"But in the furious struggle against our enemies, and against the influence of these enemies upon our own ranks; with the indispensable guidance of the Communist International—our Party has hammered out its Bolshevik line on the negro question."

(Among the literature set forth in this booklet appears also the following:

"Resolution 3 of the Communist International on the Negro Question in the United States

1. Resolution of Communist International, October, 1930.

"1. The Communist Party of the United States has always acted openly and energetically against Negro oppres- [fol. 13-105] sion and has thereby won increasing sympathy among the Negro population. In its own ranks, too, the Party has relentlessly fought the slightest evidences of white chauvinism, and has purged itself of the gross opportunism of the Lovestonites. According to the assertions of these people, the 'industrial revolution' will sweep away the remnants of slavery in the agricultural South, and will proletarianize the negro peasantry, so that the negro question, as a special national question, would thereby be presumably solved, or could be put off until the time of the socialist revolution in America. • • •

"Furthermore, it is necessary to face clearly the inevitable distinction between the position of the negro in the South and in the North, owing to the fact that at least three-fourths of the entire negro population of the United States (12,000,000) live in compact masses in the South, most of them being peasants and agricultural laborers in a state of semi-serfdom, settled in the 'Black Belt' and constituting the majority of the population, whereas the negroes in the northern states are for the most part industrial workers of the lowest categories who have recently come to the various industrial centers from the South (having often even fled from there).

"The struggle of the Communists for the equal rights of the negroes applies to all negroes, in the North as well as in the South. The struggle for this slogan embraces all or almost all of the important special interests of the negroes in the North, but not in the South, where the main Communist slogan must be: The right of self-determination of the negroes in the black belt.

These two slogans, however, are most closely connected. The negroes in the North are very much interested in winning the right of self-determination of the Negro population of the Black Belt and can thereby hope for strong support for the establishment of true equality of the Negroes in the North. In the South the Negroes are suffer-

ing no less, but still more than in the North from the glaring lack of all equality; for the most part the struggle for their most urgent partial demands in the Black Belt is nothing more than the struggle for their equal rights, and only the fulfillment of their main slogan, the right of self-determination in the Black Belt, can assure them of true equality. . . .

[fol. 13-106] "It is the special duty of the revolutionary Negro Workers to carry on tireless activity among the Negro working masses to free them of their distrust of the white proletariat and draw them into the common front of the revolutionary class struggle against the bourgeoisie . . .

"The slogan of the right of self-determination occupies the central place in the liberation struggle of the Negro population in the Black Belt against the yoke of American imperialism. But this slogan, as we see it, must be carried out only in connection with two other basic demands. Thus, there are three basic demands to be kept in mind in the Black Belt, namely, the following:

(a) Confiscation of the landed property of the white landowners and capitalists for the benefit of the negro farmers. The land property in the hands of the white American exploiters constitutes the most important material basis of the entire system of national oppression and serfdom of the Negroes in the Black Belt. More than three-quarters of all Negro farmers here are bound in actual serfdom to the farms and plantations of the white exploiters by the feudal system of 'share cropping.' Only on paper and not in practice are they freed from the yoke of their former slavery. The same holds completely true for the great mass of black contract laborers. Here the contract is only the capitalist expression of the chains of the old slavery, which even today are not infrequently applied in their natural iron form on the roads of the Black Belt (chain gang work). These are the main forms of present Negro slavery in the Black Belt, and no breaking of the chains of this slavery is possible without confiscating all the landed property of the white masters. Without this revolutionary measure, without the agrarian revolution, the right of self-determination of the Negro population would be only a Utopia or, at best, would remain only on paper without changing in any way the actual enslavement.

(b) Establishment of the State Unity of the Black Belt. At the present time this Negro zone—precisely for the purpose of facilitating national oppression—is artificially split up and divided into a number of various states which include distant localities having a majority of white population. If the right of self-determination of the Negroes is to be put into force, it is necessary wherever possible to bring together into one governmental unit all districts of [fol. 13-107] the South where the majority of the settled population consists of negroes. Within the limits of this state there will of course remain a fairly significant white minority which must submit to the right of self-determination of the negro majority. There is no other possible way of carrying out in a democratic manner the right of self-determination of the negroes. Every plan regarding the establishment of the negro state with an exclusively negro population in America (and of course still more exporting it to Africa) is nothing but an unreal and reactionary caricature of the fulfillment of the right of self-determination of the negroes, and every attempt to isolate and transport the negroes would have the most damaging effect upon their interests. Above all, it would violate the right of the negro farmers in the Black Belt not only to their present residences and their land, but also to the land owned by the white landlords and cultivated by negro labor.

(c) Right of Self-Determination. This means complete and unlimited right of the negro majority to exercise governmental authority in the entire territory of the Black Belt, as well as to decide upon the relations between their territory and other nations, particularly the United States. It would not be right of self-determination in our sense of the word if the negroes in the Black Belt had the right of self-determination only in cases which concerned exclusively the negroes and did not affect the whites, because the most important cases arising here are bound to affect the whites as well as negroes. First of all, true right to self-determination means that the negro majority and not the white minority in the entire territory of the administratively united Black Belt exercises the right of administering governmental, legislative, and judicial authority. At the present time all this power is concentrated in the hands of the white bourgeoisie and landlords. It is they

who appoint all officials, it is they who dispose of public property, it is they who determine the taxes, it is they who govern and make the laws. Therefore, the overthrow of this class rule in the Black Belt is unconditionally necessary in the struggle for the negroes' right to self-determination. This, however, means at the same time the overflow of the yoke of American imperialism in the Black Belt on which the forces of the local white bourgeoisie depend. Only in this way, only if the negro population of the Black [fol. 13-108] Belt wins its freedom from American imperialism even to the point of deciding itself the relations between its country and other governments, especially the United States, will it win real and complete self-determination. One should demand from the beginning that no armed forces of American imperialism should remain on the territory of the Black Belt.

7. As stated in the letter of the Political Secretariat of the E. C. C. I. of March 16, 1930, the Communists must 'unreservedly carry on a struggle' for the self-determination of the negro population in the Black Belt in accordance with what has been set forth above. It is incorrect and harmful to interpret the Communist standpoint to mean that the Communists stand for the right of self-determination of the negroes only up to a certain point but not beyond this, to, for example, the right of separation. It is also incorrect to say that the Communists are only to carry on propaganda or agitation for the right of self-determination, but not to develop any activity to bring this about. No, it is of the utmost importance for the Communist Party to reject any such limitation of its struggle for this slogan. Even if the situation does not yet warrant the raising of the question of uprising, one should not limit oneself at present to propaganda for the demand, 'Right to Self-Determination,' but should organize mass actions, such as demonstrations, strikes, tax boycott movements, etc.

"It would be a mistake to imagine that the 'right of self-determination' slogan is a truly revolutionary slogan only in connection with the demand for complete separation. The question of power is decided not only through the demand of separation, but just as much through the demand of the right to decide the separation question and self-determination in general. A direct question of power is also the demand of confiscation of the land of the white exploit-

ers in the South, as well as the demand of the negroes that the entire Black Belt be amalgamated into a State unit.

Hereby, every single fundamental demand of the liberation struggle of the negroes in the Black Belt is such that—if once thoroughly understood by the negro masses and adopted as their slogan—it will lead them into the struggle for the overthrow of the power of the ruling bourgeoisie, which is impossible without such revolutionary struggle. [fol. 13-109] One cannot deny that it is just possible for the negro population of the Black Belt to win the right to self-determination during capitalism; but it is perfectly clear and indubitable that this is possible only through successful revolutionary struggle for power against the American bourgeoisie, through wresting the negroes' right of self-determination from American imperialism. Thus, the slogan of right to self-determination is a real slogan of National Rebellion which, to be considered as such, need not be supplemented by proclaiming struggle for the complete separation of the negro zone, at least not at present.

(d) Communists must fight in the forefront of the national liberation movement and must do their utmost for the progress of this mass movement and its revolutionization. Negro Communists must clearly dissociate themselves from all bourgeois currents in the negro movement, must indefatigably oppose the spread of the influence of the bourgeois groups on the working negroes. • • •

(e) One must work with the utmost energy for the establishment and consolidation of Communist Party organizations and revolutionary trade unions in the South. • • •

11. It is particularly incumbent on negro Communists to criticize consistently half-heartedness and hesitations of the petty-bourgeois national-revolutionary negro leaders in the liberation struggle of the Black Belt, exposing them before the masses. • • • Simultaneously, negro Communists must carry on among the negro masses an energetic struggle against nationalist moods directed indiscriminately against all whites, workers as well as capitalists, Communists as well as imperialists. Their constant call to the negro masses must be: Revolutionary struggle against the ruling white bourgeoisie, through a fighting alliance with the revolutionary white proletariat!"

(In another portion of said Booklet, "The Communist position on the negro question" appears an article by Harry Haywood, entitled: "The Theoretical Defenders of White Chauvinism in the Labor Movement", reprinted from "The Communist" for June, 1931. A portion of this article is as follows:)

"The correctness of the program of the Communist International on the Negro Question is conclusively proven in [fol. 13-110] the present crisis by the response of the negro masses to the slogans of the Party, and by their increasing participation together with the white workers in joint struggles against the capitalist offensive. It is likewise proven by the vicious repressive measures of the ruling classes against the activities of the Communist Party and other revolutionary organization among negroes.

"It is not surprising, therefore, that the revolutionary program of the Communist Party is meeting the sharpest attacks, particularly at the present time, on the part of all chauvinist forces from the Fish Committee down to the Lovestone renegades. • • •

"But the white revolutionary workers, who understand the powerful revolutionary potentialities inherent in the struggle of the negro masses, would answer in the following manner: 'This land on which you and your ancestors have slaved for centuries rightfully belongs to you. The bosses' government in this territory is a government of foreign slave-drivers; it is our enemy as well as yours. We recognize and support your right to organize your own government, to elect your officials, to organize your own militia, and your unqualified right to separate from the United States. Moreover, we, the white revolutionary workers, will prove our sincerity right now, at the present time by actively supporting and helping to organize a struggle to bring about those conditions in which you will be able to exercise your right to self-determination.' "

(In another portion of said Booklet appears an article by Earl Browder entitled: "For National Liberation of the Negroes! War against White Chauvinism!" being labeled "Extract from a report on behalf of the Central Committee, Communist Party of U. S. A. on the subject of the struggle for Negro rights in connection with the relation between white and negro students in the school.")

"Comrades: I have purposely refrained from preparing a formal report, my purpose being to give the views of the Central Committee as informally as possible. • • •

"Among the political advances of our Party during 1931, the most decisive was precisely in the struggle for negro rights. In what did these victories consist? In this, that the Party raised concretely the issues of negro rights on the basis of the Leninist program on the national question, [fol. 13-111] and aroused masses of negroes and also of whites, to struggle upon these concrete issues. The masses have responded to our program, and in the struggle there has begun a sharp class differentiation among the negroes.

"Our Party for many years has raised the slogan of struggle for negro rights. Why have we only now begun to arouse mass struggles? There are objective and subjective reasons for this. First, the results of the crisis, which fall heaviest upon the negro masses, including the sharpening repression and lynch terror. The second includes primarily the improved work of our Party, based upon clarification of its political line and its concretization in immediate issues and daily struggles. • • •

"The purpose of our work on the negro question is to establish unity of white and black proletariat in a common struggle to overthrow capitalism, and the leadership of the proletariat over the negro masses in the struggle for their national liberation. • • •

"We are Bolsheviks, members of a fighting Party of the working class, who know that the only road to the revolutionary overthrow of capitalism and the establishment of Communism is through welding together the iron unity of class idealogy which penetrates into our ranks, as the prerequisite to the effective struggle against the class enemy physically. • • • "

Document No. 14

The July, 1932, issue of "The Communists", labeled "A Magazine of the Theory and Practice of Marxism-Leninism", published monthly by the Communist Party of the United States of America." The contents of said magazine are the following articles:

"Concretize and Strengthen the Anti-War Struggle" ..... Editorial
"Place the Party on a War Footing" By Earl Browder

Contradictions Among the Imperialists and Conflicts on the Pacific Coast	By N. Terentyev
Yankee Imperialist Intervention against the Chinese Revolution	By M. James
The Revolutionary Example of the Japanese Toilers	By Kumamoto
Will Imperialist War bring back Prosperity?	By Robt. W. Dunn
[fol. 13-112] The Philippine Islands in the War Area	By William Simons
The Struggle against the Provocateur The Defense of the Fatherland	By V. I. Lenin"

(The first article, editorial, contains the following:)

"The capitalist class of the United States finds itself at the present time in the process of 'growing into' a new world war, into the war against the Soviet Union. Already at the XVII Conference of the Communist Party of the Soviet Union, Comrade Moletov has pointed out that the peculiar characteristic of the present situation is the fact that the ruling classes, actively supported by the social-fascist leaders, are applying the tactic of 'peacefully growing into' war. It is this peculiar tactic, followed by world capitalism under the screen of the most intense pacifist maneuvers, that we must concentrate on exposing before the masses in order to bring about a more determined and concrete struggle against the imperialist war and for the *defense of the Soviet Union.*"

"Infinitely more attention must be paid to development of the mass struggles for negro rights. Our main weakness here still remains the insufficient following out of the policy of unfolding daily struggles against negro discrimination and oppression, especially against lynchings, and the drawing of white workers together with the negroes into the fight. And in close connection with this decisive activity we must broadly unfold the full negro program of the Party exposing the social fascists (Thomas' opposition to self-determination and his threat of 'race riots') and the negro reformists.

Document No. 15

A book of 247 pages, entitled: "Communism and Christianism", "Analyzed and contrasted from the Marxian and

Darwinian points of view." By Rt. Rev. William Montgomery Brown, D. D., Episcopus in partibus Bolshevikium et Infidelium.

(See extracts from this book, 3 pages forward.)

Document No. 16

A four-page leaflet entitled: "An Appeal to Southern Young Workers," part of which is as follows:

"The Young Communist League is the champion not only of the young white workers but especially of the doubly [fol. 13-113] oppressed negro young workers. The Young Communist League fights against the whole system of race discrimination and stands for full racial, political, economic and social equality of all workers.

"The chief aim of the Young Communist League is to organize the young workers for a struggle against the bosses and against the whole profit system.

"The Young Communist League is a section of the Young Communist International, the revolutionary leader of the young workers the world over and accepts the guidance of the Communist Party of America.

"The Young Communist League fights for:

1. At least $20.00 weekly wage for all young workers.

2. A six hour day for all young workers under 18.

3. 4 weeks' vacation with pay for all young workers.

4. Two 15 minute rest period every day. Against the speed-up system.

5. No child labor under 14. The State to support all those now employed under that age.

6. Equal pay for equal work.

7. Full political, social and racial equality for the negro workers.

8. Against bosses' wars! Defend the Soviet Union!

9. Smash the National Guard, the C. M. T. C. and R. O. T. C.

10. For the right of all workers to defend themselves, their union, their right to organize, free speech.

11. Freedom of the Gastonia prisoners and all other class prisoners.

12. For A workers and farmers Government in the United States.

Young Workers! Join the Young Communist League."

Document No. 17

A 64-page booklet entitled: "Party Organizer", Special Plenum issue, May-June, 1932. Issue by Central Committee, Communist Party, U. S. A., containing a number of articles on the Communist Party and what it advocates, and particularly how to organize workers into "cadres."

Document No. 18

A book of 126 pages entitled: "The Life and Struggles of Negro Toilers," by George Padmore. Published by the [fol. 13-114] R. I. L. U. Magazine for the International Trade Union Committee of Negro Workers.

Following are the contents of this book, by chapters:

Chapter I. Oppression of Negro Toilers (Africa).
Chapter II. Black Slaves in the New World.
Chapter III. Under the Yoke of Yankee Imperialism.
Chapter IV. The Awakening of Negro Toilers.
Chapter V. Black Soldiers of Imperialism.
Chapter VI. Revolutionary Perspectives.

(Extracts from Chapter II, (page 46) are as follows:)

"Therefore, unlike their black brother in Africa, the Negroes of the New World have had centuries of contact with the white capitalist civilization. But like the negroes in Africa, they are subjected to the same barbarous methods of imperialist plunder and exploitation. • • • In no other so-called civilized country in the world are human beings treated as badly as these 15 million negroes. They live under a perpetual regime of white terror, which expresses itself in lynchings, peonage, racial segregation and other pronounced forms of white chauvinism. • • • They are absolutely at the mercy of every fiendish mob incited by the white landlords and capitalists. Bands of business and professional men make periodical raids upon the black countryside, where they lynch negroes, burn homes

and destroy the crops and other property belonging to the blacks. In most cases of lynching the negroes are burned to death after their bodies have been soaked in gasoline, while others are hanged from trees. On these occasions the entire white community turned out to witness the bloody spectacles, which were made 'Roman Holidays'."

On page 48 of this book it is charged that white people "invade the sections where the negroes live, burn homes and crops, kill off live stock, poison drinking wells, murder and lynch unarmed men, women and children who dare to offer resistance to their programs."

(Following are some quotations from the book, "Communism and Christianism", which is listed, supra, as Document No. 15:)

"Banish the Gods from the Skies and Capitalists from the Earth and make the World safe for Industrial Communism."

[fol. 13-115] "As the machinery of capitalist government, including the armed forces of the nation, conserves the monopoly by the capitalist class of the wealth taken from the workers, the working class must organize consciously and politically for acquiring the powers of government, national and local, in order that this machinery, including these forces, may be converted from an instrument of oppression into the agent of emancipation and the overthrow of privilege, aristocratic and plutocratic.

"The trouble with every reformatory socialism of modern times is, that it undertakes the impossibility of changing the fruit of the capitalist state into that of the communistic one, without changing the political organism; but to do that is as impossible as to gather grapes from thorns or figs from thistles. Hence an uprooting and replanting are necessary (a revolution not a reformation) which will give the world a new tree of state.

"Capitalism no longer grows the fruits (foods, clothes and houses) which are necessary to the sustenance of all the world. Hence it must be dug up by the roots in order that a tree which is so organized that it will bear these necessities for the whole world may be planted in its place.

"The people of Russia have accomplished this uprooting and replanting (this revolution) in the case of their state, and those of every nation are destined to do the same in

one way or another, each according to its historical and economic development, some with much violence, most, I hope, with but little."

Document No. 19

A sixty-page book of receipts for money for the Communist Election Campaign Fund, the following being a sample page:

[fol. 13-116] (Here follows photolithograph of page of receipt book, side folio 13-116A)

BROUGHT FORWARD

No. 2286

$100,000.00 Communist Election Campaign Fund
P. O. Box 87, Station D, New York, N. Y.

District Section Org. Press City State

Received from

Address

1932 Received by

No. 2287

$100,000.00 Communist Election Campaign Fund
P. O. Box 87, Station D, New York, N. Y.

District Section Org. Press City State

Received from

Address

1932 Received by

No. 2288

$100,000.00 Communist Election Campaign Fund
P. O. Box 87, Station D, New York, N. Y.

District Section Org. Press City State

Received from

Address

1932 Received by

No. 2289

$100,000.00 Communist Election Campaign Fund
P. O. Box 87, Station D, New York, N. Y.

District Section Org. Press City State

Received from

Address

1932 Received by

No. 2290

$100,000.00 Communist Election Campaign Fund
P. O. Box 87, Station D, New York, N. Y.

District Section Org. Press City State

Received from

Address

1932 Received by

CARRIED FORWARD

13-116A

74A

[fol. 13-117] Document No. 20

A sheet of "minutes" (typewritten) as follows:

"Minutes of the Section Committee

July 10, 1932

"Members present, 4; Absent, 2.

Comrade H, reported in detail on the DB meeting. Main points of BD meeting August 1st, Birmingham, etc. For Atlanta nothing definite laid out for this section, only proposals of work was agreed on by the DB. In organizing our unemployed groups we can get a lot of experience from the way the comrades there are doing in organizing their unemployed groups (Capitans and sub Capitans in the different wards, Capitans have meeting- weekly together map out plan of work for the whole ward). On August first, it will depend upon our success to break thru on the issue of demanding unemployment relief, etc. Comrades F., L, and others to go to Mayor and ask for permit for vacant place for the unemployed to meet and discuss their problems. This unemployed meeting will be a perliminary for August first. Organize special day for distribution of the 750 copies of the Daily's that we will get for our section. All CP Members to be on *the* duty at the August first meeting and the unemployed meetings too. They are to get as many contacts as they can with unemployed workers to start groups in their neighborhoods, and the results shouldn't be like it was at our demonstration. Comrades H, and H, K, and Houseworth to meet with ILD, take up policy of work with them of developing local struggles to popularize the Scottsboro case more effectifully among the White workers and the negro workers as well, to visit all Churches possible to raise funds for the defense. By pointing out to the White workers, that they are being framed up as well as the negro and on these basis we will be able to get more white workers to support the Scottsboro campaign. Also two white comrades must be assigned to the ILD group and attend meetings regular. Comrade F, will be unit org. of unit 12, H, to attend unit 12, meeting, Hern, to meet unit 11."

Docket No. 21

A note-book containing penciled "minutes" and notes as follows:

"The Ford & Foster Club met on Friday night July 1, and Miss King was the first speaker.

[fol. 13-118] 2 and carmade Hall next he read a pece in the Atlanta Georgian that they was 6,000 dollars raze for the unployed releaf after the Demestrahun at the Cort house on thirday morning.

3 three join at the last meeting and it was moved in second the each carmade will pay 5¢ dues a week

4 and it was all so moved in second that carmade Russell will be our treager

5 it was all so moved in second that carmade Walker Carmade Lula turner Carmade Josiephine Bullock on the Orzashoion committie.

6 then the meeting rejurn.

"Ford and Foster Club, Friday night meeting July 10.

The election of delagate to the state convanism here in Atlanta Ga Carmade King spoke on the relaf for the workers She all so spoke on the demand that all the prison that are on the changan shall be relested and it was moved in second.

Mr. Whitaker, head of Community chest!

All so Carmade Hall left it up to us to demand for that 6,000 dollars that has ben razed for the unployd

It was discushed betwen all the Comrade that the demand for the release of 6,000 in cash money

It was all so moved in second that we all so demand a turn ½ of cold to each famley for this wenter

Carmade Walker reported that he was to orzinize to clubs one on east side and one on the north side

It was all so moved in second that the school chirldren will get cloth and car fair from the city realf

Next Carmade Montgomery Carmade Edd Grove Carmade Russell Carmade Walker are the Delagate to the State convanison here in Atlanta Ga. three new members

Document No. 22

Postoffice box rent receipt, as follows:

"No. 1039 Post Office Atlanta, Ga.
Sept. 29, 1931.

M- James Dix.

To Rent of Box No. 339 for Quarter Ending Dec. 31, 1931, $2.00.

Received payment, Edw. K. Large, Postmaster.
J. M. C.

[fol. 13-119] Document No. 23

Postoffice box rent receipt, as follows:

"No. 798. Post Office, Atlanta, Georgia,
Dec. 30, 1931.

Mr. James Dix.

To Rent of Box No. 339 for Quarter Ending Mar. 31, 1932, $2.00.

Received payment, Edw. K. Large, P. M. J. M. C.

Document No. 24

Postoffice box rent receipt, as follows:

"No. 1201. Post Office, Atlanta, Georgia,
Mar. 31, 1932.

M- James Dix.

To Rent of Box No. 339 for Quarter Ending June 30, 1932, $2.00.

Received payment, Edw. K. Large, P. M. J. M. C.

Document No. 25

Postoffice box rent receipt, as follows:

"No. 155. Post Office, Atlanta, Georgia,
Jul. 5, 1932.

M- James Dix.

To Rent of Box No. 339 for Quarter ending Sept. 30, 1932, $2.00.

Received payment, Edw. K. Large, P. M. J. M. C.

Document No. 26

Typewritten "minutes" as follows:

"Minutes of the Foster & Ford Clubs

July 8, 1932

Club No. 3. The meeting started at 830 o'clock. Comrad King gave a detail report on the election campaign and the tasks the clubs should carry out in the election work. The floor was then open for the election of delegates to the state convention to be held in Atlanta pretty soon, and the following comrades was elected: Comrad Montgomery, Comrade Russell, Comrade Walker, Comrade Grove. The delegates are to be notified a couple of days ahead of time for the convention. Comrade King also went in detail on the question of the demands that we should be willing to fight for, the demands are as follows: For the [fol. 13-120] release of all workers arrested and framed up on vagrancy and that this vagrancy law be did away with completely. (2) That each unemployed workers should get $4.00 a week no matter how small their family but in the case of a larger family the amount should be enough to provide for all of them if there are 12 in a family they should get $12.00 a week and so on: (3) There should not be any form of discrimination in the distribution of this relief, against negro workers mainly, and other workers who do not have familys etc. (4) Half of this amount to be in the form of cash money and the other half will be in scrip, for instance if one family get six dollars, half of this should be cash and the other scrip. (5) That City and the County begin to get ready now to provide 1 ton and a half for all unemployed workers for this winter starting with September first and ending the latter part of April. (6) That the City and County officials and their government provide free shoe clothing, and car fare for the childrens of the unemployed workers of Atlanta. Comrade Walker reported that he was going to organize clubs on the east side and the North side and other places where he no workers. The meeting adjourned at 10 o'clock.

"Comrade K, to write center on the question of the composition of the Candidates in the election since there has been some confusion on this question. Also to prepare draft

leaflet for state convention. All election clubs to elect delegates at their next meetings to the city central committee of the election campaign. Comrade Housew, to take care of the ILD meeting Tuesday, and take up special points with them.

Section Committee of Atlanta, Georgia, Box 339, Post Office.

Document No. 27

Plain envelope addressed: "Angelo Herndon, Box 339, City" containing two red cards: Application for Membership in Communist Party of the U. S. A., as follows:

(Here follows photolithograph of Application for Membership, side folio 13-120A)

8

COMMUNIST PARTY of the U. S. A.

Application for Membership

The undersigned declares his adherence to the program and statutes of the Communist International and the Communist Party of the U. S. A. and agrees to submit to the discipline of the Party and to engage actively in its work.

.....
(Signature of applicant)

Proposed by (1).....

(2).....

NOTE: An application fee of 50 cents (for unemployed 10c) must accompany the card. The space below to be filled out by the Nucleus Secretary.

Date proposed .....Date Accepted .....

District ..... City .... Sec. .....Unit .....

.....
(Signature of Nucleus Secretary)

Assigned to .....

See other side.

13 -120A

[fol. 13-121] Document No. 28

Copy of the "Daily Worker", a newspaper, labelled "Central Organ of the Communist Party, U. S. A.", issue of July 8, 1932, containing various news articles and editorials, among them being an article issued by "Central Committee, C. P. U. S. A." saying in part as follows:

"The Communist Party fights for peace, fights against imperialist war, fights for the defense of the only workers' republic in the world—The Soviet Union. • • •

"The Communist Party is the only party which fights for equal rights for the negro people. It is the only party which fights for the right of the negro people to govern in the 'Black Belt'." • • •

"Every penny you contribute will aid the Communist Party and the Daily Worker bring the program of the revolutionary workingclass to every nook and corner of the United States."

The title lines of this newspaper, with the six planks of the Communist Party published at the top of the page, are as follows:

[fol. 13-122] (Here follows photolithographs of side folios. 13-122A, 13-122B and 13-122C)

Daily Worker

Central Organ of the Communist Party U.S.A.

(Section of the Communist International)

VOTE COMMUNIST FOR

1. Unemployment and Social Insurance at the expense of the state and employers.
2. Against Hoover's wage-cutting policy.
3. Emergency relief for the poor farmers without restrictions by the government and banks; exemption of poor farmers from taxes, and no forced collection of rents or debts.

VOTE COMMUNIST FOR

4. Equal rights for the Negroes and self-determination for the Black Belt.
5. Against capitalist terror; against all forms of suppression of the political rights of workers.
6. Against imperialist war; for the defense of the Chinese people and of the Soviet Union.

13-1224 83A

"Everything Is Peaches Down in Georgia"

By OTTO HALL

FOR "Tin Pan Alley" song writer, who wrote this song, should look at Georgia today. He would certainly find that things are a long way from being "peaches" down there now, and that they never were—for the majority of the toiling population of this state, Negro or white. The gentleman who wrote this song is typical of the "inspired" capitalist song writers of the day. He probably has been about as far South as the "Battery," and is therefore well qualified to write these songs that glorify capitalist America.

If the workers and poor farmers in the North are in this third year of the crisis, suffering and have had their living standards reduced to the starvation level, the condition of the toilers in this section is one hundred fold worse. Particularly is this true in the state of Georgia. Negro and white tenant farmers, unable to live any longer on the farms, are picking up their few belongings (if they happen to have any) and flocking to the cities, thus adding to the ever-growing number of unemployed in the urban centers. The so-called independent small farm owners are having their farms taken away from them by the mortgage bankers for back debts, and by the state for inability to keep up their taxes.

The Hoover Farm Board has given these farmers some left-handed help by buying thousands of sacks of flour and shipping it to the big plantation owners and mortgage bankers in the towns, who pay the freight on this flour and store it in their granaries and sell it at high prices to the poor farmers and Negro share-croppers, in spite of the fact that each sack is plainly marked "not to be sold." There are hundreds of abandoned farms in this state, where the farmers have been forced to leave and their farms taken over by the bankers and the state.

The Song and the Facts

More Negroes Forced Into Peonage.

As for the Negroes, who greatly outnumber the whites in the rural sections, there are scarcely a handful of farm owners left. Overseers are now standing over the Negro share-croppers and tenant farmers with guns, driving them to work like convicts. These workers are finding it impossible to escape this slavery, and whenever the runaways are picked up in the cities they are promptly shipped back by felons. In Monroe County, some Negro farmers were sent government loan checks through the banks, amounting to several thousands of dollars. These checks were brazenly confiscated by the bankers and rich farmers of that territory, and the Negroes were terrorized into allowing themselves to be robbed of this money. Many of the Negro families, who have escaped this slavery, have stated openly that they will die before they will allow themselves to be sent back.

White Workers Forced to New Low Level.

One of the most noticeable effects of the crisis in this section is that the standard of living of a great majority of the whites has already reached a level as low as that of the Negroes. It is a common expression down here, that a white man can be hired cheaper that what it used to cost to hire a Negro. Whites are glad to get jobs now that used to be considered exclusively "nigger jobs."

This situation, which is of the greatest importance in the development of the revolutionary movement today and is speeding the unity of Negro and white workers, means that capitalism is no longer able to maintain the material basis for the ideology of white superiority among ever larger sections of the white working class. White workers, in these parts, are beginning to realize that the capitalist bunk about "Anglo- Saxon superiority," merely gives them the privilege (?) of starving separately from the Negroes.

Atlanta Cuts Off Relief.

The immediate need of working-class unity has lately been placed before the workers of Atlanta and the rest of the state in its sharpest form. The entire capitalist press of this section has been carrying on an intensive beat to the farm agitation. In spite of the fact that numerous workers, Negro and white, have been forced to leave their farms because of inability to live on them any longer, editorial after editorial has appeared in the press hauling the back to the farm movement.

The real purpose behind all this agitation was brazenly exposed at a meeting of the County Commission, together with a group of charity fakers. According to the local press, this meeting was called for the purpose of talking up an emergency situation that had arisen in Atlanta due to the recent closing of the relief stations which affected twenty-two thousand workers. These workers, who constitute about one-fourth of the totally unemployed in Atlanta, were receiving a miserable pittance through the Community Chest fund. When this relief closed down, it doomed these workers to quick starvation with the rest of the unemployed. In spite of the fact that only a few months ago the Community Chest fakers collected over eight hundred thousand dollars from the workers of this city, they now claim to be without funds and unable to continue the miserable relief they have been giving.

They came to the meeting of the County Commissioners with proposals to add to the already heavy tax burden of the poor workers and home owners in order to maintain their high-salaried jobs.

Mr. Frank Neely, executive director of the local Community Chest and a sixty-five hundred dollar a year faker, shed crocodile tears over the plight of all the starving workers and said that though he was hard-boiled, his heart bled for those poor families that came to his office for relief."

Urge Back to Ruined Farms Plan.

But it remained for Mr. Walter S. McNeal, Jr., a big banker and real estate man of Atlanta, to make the proposal that was hailed by the press and the County Commissioners as the most concrete proposal of the evening. He pointed out that there are hundreds of

DOCUMENT #29.

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[illegal] is now [illegal] and some [illegal] are in jail and we are [illegal] [illegal] [illegal]

[fol. 13-123] Document No. 29

Copy of the "Daily Worker," issue of July 8, 1932, being another issue of the same newspaper set forth in preceding document. This issue has the same title line, with the six planks of the Communist Party listed at the top of the first page, the same as quoted in Exhibit 28.

The following article appears on the 6th (editorial) page of this issue:

Document No. 30; being a circular letter as follows:

Workers of Atlanta

Employed and unemployed Negro and White

Attention!

Men and Women of Atlanta:

Thousands of us, together with our families, are at this minute facing starvation and misery and are about to be thrown out of our houses because the miserable charity handout that some of us were getting, has been stopped! Hundreds of thousands of dollars has been collected from the workers in this City for relief for the unemployed, and most of it has been squandered in high salaries for the heads of these relief agencies.

Mr. T. K. Glenn, president of the Community Chest is reported to be getting a salary of 10,000 dollars a year. Mr. Frank Neely, executive director of the Community Chest, told the County Commission Saturday that he gets 6,400 dollars a year while at the same time no worker, no matter how big his family, gets no more than two dollars and a half weekly to live on. If we count the salaries paid the secretaries and the investigators working in the 38 relief stations in this City, it should not surprise us that the money for relief was used up and there is no more left to keep us from starvation. If we allow ourselves to starve will these fakers grow fat off our misery, it will be our own fault!

The bosses want us to starve peacefully and by this method save the money they have accumulated off of our sweat and blood. We must force them to continue our relief and give more help. We must not allow them to stall

us any longer with fake promises. The City and County [fol. 13-124] authorities from the money they have already collected from us in taxes, and by taxing the incomes of the bankers and other rich capitalists, can take care of every unemployed family in Atlanta. We must make them do it.

At a meeting of the County Commissioners last Saturday, it was proposed by Walter S. McNeal, Jr., to have the police round up all unemployed workers and their families and ship them to the farms and make them work for just board and no wages, while just a few months ago these hypocrites were talking about forced labor in Soviet Russia, a country where there is no starvation and where the workers rule! Are we going to let them force us into slavery?

At this meeting Mr. Hendrix said that there were no starving families in Atlanta, that if there is he has not seen any. Let's all of us, white and negroes together, with our women folk and children go to his office in the county court house on Pryor and Hunter Sts. Thursday morning at 10 o'clock and show this faker that there is plenty of suffering in the city of Atlanta and demand that he gives us immediate relief! Organize and fight for unemployment insurance at the expense of the Government and the bosses! Demand immediate payment of the payment of the bonus to the ex-service men. Don't forget Thursday morning at the County Courthouse.

Issued by the Unemployed Committee of Atlanta.
P. O. Box 339.

Document No. 31, being a circular as follows:

Our Demonstration got us $6,000 from the County

Workers of Atlanta!

Employed and unemployed! Negro and White

The County Commissioners voted $6,000 to continue our relief, because Thursday, hundreds of us, Negro and White, went to the Court House, showed the bosses there was plenty of starvation in Atlanta, and demanded relief. We crammed that lie down the throat of Commissioner Hendricks who said there were no starving families—but this gentleman was not present Thursday morning. While we

have gained something by showing the bosses we will not starve peacefully, this is not enough! The County and City say they have no money. Where is the $600,000.00 that was [fol. 13-125] saved by cutting the salaries of the County officials? Why can't this money be given for relief? We can force these fakers to give us more relief if we organize and fight for it!

They are still talking about sending us to the farms to work for nothing the bosses will use any trick to keep us from getting the relief we are entitled to. Don't be fooled by this talk about good times on the farms: The farmers are starving and as ragged as we are!

Bosses Shocked by Unity of Negro and White

The biggest surprise handed the bosses who have been starving us out was when they saw Negro and White workers come down together to fight for relief. For many years they have handed us a lot of bunk about not having anything to do with the Negroes, and at the same time starving both of us. We white workers should not have allowed Commissioner Stewart and those other fakers to separate us from the negroes who came there with us. If we allow the bosses to divide us they will keep us both starving. We negro and white workers must stick together because that is the only way we can win. The bosses know this; that is why they work so hard to separate us. The privilege of starving separately don't mean anything to any sensible worker these days. The ex-servicemen in Washington know this, and Negro and White ex-servicemen are sticking together until they get their back pay—called the Bonus.

We Must Organize

Every day the bosses and landlords cut off our water and throw us out on the streets, both Negro and White. They don't care how many of us starve, white or black. We won't starve if we organize! The unemployed committee calls on the workers of every neighborhood to get together, organize your committees and see that no worker is evicted because he can't pay the rent. We must see that every relief station stays open and all of us and our kids are fed! There is no reason for any worker to starve in the midst of plenty! The unemployed Committee will call

a meeting in the near future of all workers, negro and white, to get together and make up our program of demands that we will organize and fight for.

Watch for our next circular!

[fol. 13-126] We refuse to starve.

For information, write to

C. Jones, Chairman, Box 339, Atlanta, Ga. Unemployed Committee of Atlanta.

[fol. 14] [File endorsement omitted.]

[fol. 15] IN SUPERIOR COURT OF FULTON COUNTY

No. 141

ANGELO HERNDON

vs.

J. I. LOWRY, Sheriff

Habeas Corpus

SPECIAL DEMURRER AND MOTION TO STRIKE—Filed November 12, 1935

Now comes the respondent, J. I. Lowry, Sheriff of Fulton County and files this his special demurrer, and says:

1. Respondent specially demurs to so much of par. 5 of the petition as says:

"• • • a full statement of which (evidence) is contained on pages 56 to 126, both inclusive, of the record on petitioner's appeal in the Supreme Court of the United States, a copy of which is marked exhibit "C," attached hereto, and made a part hereof."

And respondent demurs to the incorporation of said document above referred to as Exhibit "C" to said petition.

2. For ground of demurrer respondent says that said evidence and the reference thereto have no proper part in this case, as a review of the evidence in a trial cannot be obtained by habeas corpus proceeding taken after conviction.

Wherefore, Respondent moves to Strike from said petition the above quoted portion of par. 5 and the exhibit "C" attached thereto.

Respectfully submitted, J. W. LeCraw, John H. Hudson, John A. Boykin, Sol. Genl., Counsel for Respondent.

[File endorsement omitted.]

[fol. 16] Overruled—Dec. 7, 1935.

Hugh M. Dorsey, Judge S. C. A. C.

[fol. 17] In Superior Court of Fulton County

[Title omitted]

Answer of J. I. Lowry, Sheriff—Filed November 12, 1935

Now comes J. I. Lowry, Sheriff, respondent in above case, and files this answer to the petition for habeas corpus.

1. Respondent admits paragraphs two (2) and four (4).

2. Respondent admits the statement in par. 1 that petitioner is of the negro race, but can neither admit nor deny as to his citizenship.

3. Respondent denies paragraph three (3).

4. Respondent admits the first part of par. five (5)—as to the indictment and the correctness of the copy thereof attached to the petition—but for lack of information the respondent can neither admit nor deny the latter part of said paragraph relating to the evidence; and furthermore respondent contends that the evidence is immaterial and irrelevant to this proceeding.

5. Respondent can neither admit nor deny paragraph six (6), as same consists of mere conclusions as to the evidence.

6. Respondent denies that Section 56 of the Georgia Penal Code of 1910 is correctly quoted in paragraph seven (7). A correct copy of said penal law is as follows:

"Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful

authority of the State shall constitute an attempt to incite insurrection."

Respondent admits the correctness of the extracts from the opinion of the Supreme Court of Georgia. Respondent denies the last sentence of paragraph seven (7). Same consists, however, only of legal contentions.

7. Likewise, respondent denies paragraph eight (8), but says that same consists only of legal contentions, for decision by the Court.

[fol. 18] 8. Respondent denies paragraph nine (9), and says that there has been an adjudication of at least a part of the constitutional questions here raised in the overruling of the Motion to Quash the indictment in the case of the State vs. Angelo Herndon, being the same indictment and conviction referred to in this petition for habeas corpus. Said Motion to Quash was overruled by Judge L. B. Wyatt, Judge of the Superior Court, Coweta Circuit, sitting in Fulton Superior Court, on January 16, 1933. A copy of said Motion to Quash is attached hereto, marked Exhibit "A."

Respectfully submitted, J. W. LeCraw, John H. Hudson, John A. Boykin, Sol. Genl., Counsel for J. I. Lowry, Sheriff.

Duly sworn to by J. I. Lowry. Jurat omitted in printing.

[fol. 19] EXHIBIT "A" TO ANSWER

FULTON SUPERIOR COURT (CRIMINAL DIVISION)

No. 37812

STATE OF GEORGIA, U. S. A.

vs.

ANGELO HERNDON

MOTION TO QUASH INDICTMENT

Now comes the defendant in the above named case, and before being arraigned, before waiving arraignment, before

pleading guilty, before pleading in abatement, files his motion to quash this indictment, and shows:

1. That Negroes were wrongfully, unlawfully, systematically and intentionally excluded from the Grand Jury which indicted Angelo Herndon, in direct violation of the 14th Amendment of the Constitution of the United States, and of paragraph 3, article 1, of the Constitution of the State of Georgia.

2. That the Grand Jury was not legally convoked as required by the law of the State, and the law of the United States.

3. That the evidence submitted to the Grand Jury did not warrant a true bill of indictment being found against Angelo Herndon.

4. That the statute upon which said unlawful indictment is based is in direct violation of the Constitution of the State of Georgia, paragraph 15, article 1, and of the Constitution of the United States.

Therefore, the defendant prays that this indictment be quashed.

John H. Geer, Ben J. Davis, Jr., Attorneys for Defendant.

[File endorsement omitted.]

[fol. 20] In Superior Court of Fulton County

No. 141

Angelo Herndon

vs.

J. I. Lowry, Sheriff

Habeas Corpus

Judgment—Filed December 7, 1935

At the trial of the writ above stated, testimony and documents hereinafter referred to were tendered in evidence,

objections made to their admissibility, and decision thereon reserved.

1. Applicant presented testimony identifying records before the Supreme Court of the United States in the case of Herndon versus State of Georgia.

2. Applicant tendered portions of records to which reference is above made.

3. Respondent tendered a motion to quash Indictment No. 37812, on which Herndon was tried and convicted, as made in this Court at his trial by a Jury.

Held, objections overruled.

4. Applicant submits contentions that the law under which he was convicted is, as construed and applied in his case, unconstitutional, and that his detention thereunder is illegal, void and of no effect.

Held and adjudicated: That the applicant's contention that this law in question, as construed and applied in his case, is in conflict with the Fourteenth Amendment of the Constitution of the United States, in that it "is too vague and indefinite to provide a sufficiently ascertainable standard of guilt; and that it is also in conflict with Article 1, Section 1, Paragraph 3, of the Constitution of the State of Georgia for the same reason, and that his conviction and sentence are unconstitutional, illegal, void and of no effect, be and the same is hereby sustained.

Contentions of applicant other than that above stated, are not sustained.

Ordered, That the applicant be and he is hereby remanded to the custody of the respondent for twenty (20) days, such being the period allowed by law in which exceptions and appeal to the higher court may be taken by re-
[fol. 21] spondent to this order and judgment; and, if such exceptions and appeal shall be taken, then until the final disposition of the case by the higher courts. Provided, however, that at any time, applicant may be released from custody upon giving bail with good and sufficient surety, acceptable to the Sheriff of this county, in the sum of Eight Thousand ($8,000.00) Dollars, conditioned upon applicant appearing and abiding the ultimate judgment and sentence of the Court, if this order and judgment should be set aside.

And provided further, that if there shall be no exceptions

to this order and judgment, and no appeal taken to the higher court, applicant shall, at the expiration of the period aforesaid, be immediately released and discharged from respondent's custody, in so far as he is held and restrained of his liberty under the conviction and sentence referred to herein.

Dec. 7th, 1935.

Hugh M. Dorsey, Judge S. C. A. C.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 22] [File endorsement omitted]

[fol. 23] IN SUPERIOR COURT OF FULTON COUNTY

Bill of Exceptions—Filed December 11, 1935

Be it Remembered that on the 12th day of November, 1935, there came on to be heard in the superior court of said county, before the Hon. Hugh M. Dorsey, Judge of said court then and there presiding, the case of Angelo Herndon vs. J. I. Lowry, Sheriff of Fulton County, being a petition for the writ of habeas corpus wherein the said Angelo Herndon alleged that he was being unlawfully restrained of his liberty by the said respondent, and upon which petition the said Judge of said court had previously entered an order requiring the said respondent to produce the body of Angelo Herndon before him in said court on the said Nov. 12, 1935, to be disposed of as the law directs.

Be it Further Remembered that at the time and place so fixed the said respondent produced the said Angelo Herndon, and filed his answer to said writ of habeas corpus. Respondent also presented and filed his "Special Demurrer and Motion to Strike," in which he demurred specially to a certain portion of the petition for habeas corpus. After argument on said demurrer and motion to strike, the said Judge Dorsey reserved his decision thereon until a later date.

Be it Further Remembered that the case then proceeded to hearing before said Judge upon the petition for habeas

corpus and the answer of the respondent. The petitioner tendered in evidence the record of the brief of the evidence which had been adduced at the trial of the State of Georgia vs. Angelo Herndon in Fulton Superior Court, upon indictment No. 37,812, referred to in Par. 5 of the petition for habeas corpus in this case, and set forth in full as "Exhibit C" to the said petition for habeas corpus. Counsel for the respondent admitted the correctness of the said Exhibit as setting forth a brief of the evidence which had been adduced at the trial of the said case of the State of Georgia vs. Angelo Herndon in Fulton superior court upon indictment No. 37,812, but objected to the admission of said brief of evidence in the present hearing on the ground that a review of the evidence in a criminal trial cannot be obtained by a habeas corpus proceeding, and that the evidence which had been adduced at the trial of the indictment has no proper place or part in the hearing of a habeas [fol. 24] corpus such as the one on trial. Said Judge Hugh M. Dorsey reserved his decision on said objection, but subsequently overruled said objection as will be set out.

Be it Further Remembered that at said hearing the respondent introduced as a witness W. H. Spratlin, who being duly sworn, testified that he was a deputy clerk of Fulton superior court, in the criminal division thereof, and identified a paper presented to him as being a part of the records of said court, to wit: "Motion to Quash Indictment" filed by John H. Geer and Benj. Davis, Jr., as attorneys for Angelo Herndon in the case of the State of Georgia vs. Angelo Herndon, No. 37,812, filed Jan. 16, 1933, and hearing an order thereon by Judge L. B. Wyatt, Judge Superior Court, presiding in said case on Jan. 16, 1933, as follows: "This Motion to Quash, being traversed by the State, and evidence heard by the court without a jury by agreement of counsel waiving a jury herein, the Court hereby overrules the Motion to Quash." Counsel for respondent then tendered in evidence the said "Motion to Quash Indictment" in indictment No. 37,812, and the order upon the same, which was then and there admitted in evidence by the Court. The said document so admitted appears in the record of the present case as "Exhibit A" to the answer of the respondent, said Exhibit being a correct copy of the said "Motion to Quash Indictment."

Counsel for respondent conceded in open court that petitioner was held in custody by respondent under the sentence set forth as Exhibit A to the petition.

No Further Evidence was introduced at said hearing, but same proceeded to argument upon the legal questions presented by said petition for habeas corpus and the answer of respondent. At the conclusion of said hearing the said judge reserved his decision thereon until a subsequent date.

Be it Further Remembered that on December 7, 1935, the said Judge of said court rendered his decision upon the questions above presented, as follows:

[fol. 25] DECISION

(a) Respondent's Special Demurrer and Motion to Strike was overruled and denied.

(b) Respondent's objection to the admission in evidence in the present hearing of the brief of evidence adduced at trial of the indictment was Overruled, and said evidence was admitted.

(c) The law of the State of Georgia under which petitioner had been convicted, to wit: Section 56 of the Penal Code of 1910, as construed and applied in petitioner's case, was held unconstitutional in certain respects more particularly set out in said order.

(d) The conviction and sentence of said petitioner as set forth in his petition was held unconstitutional, illegal, void and of no effect.

(e) The said Angelo Herndon was ordered released by the respondent at the end of twenty days, in so far as said conviction and sentence was concerned, if the respondent did not appeal to the higher court.

(f) Said Angelo Herndon was allowed to make bond in the sum of $8,000, conditioned upon his appearing and abiding the ultimate judgment and sentence of the court, if the present order and judgment should be set aside.

Whereupon judgment and order to the above effect was entered by the said Judge of Fulton Superior Court.

ASSIGNMENTS OF ERROR

To so much of said order as is set forth in (a), (b), (c), (d) and (e), the said J. I. Lowry, sheriff as aforesaid, then and there excepted and here and now excepts, and assigns the same as error, and says that the Judge of said court erred in each of the respects herein designated and excepted to, and erred in not remanding the said Angelo Herndon to the custody of respondent for the purpose of serving the said sentence which had been imposed upon him in Fulton superior court, under indictment No. 37,812.

And now comes the said J. I. Lowry, sheriff of Fulton County, within the time allowed by law and within 20 days [fol. 26] from the date of the order and rulings and judgment complained of, and names himself as plaintiff in error in this bill of exceptions, and the said Angelo Herndon as defendant in error herein, and presents this bill of exceptions to the Hon. Hugh M. Dorsey, Judge of said court, as aforesaid, and prays that the same may be signed and certified in order that the errors complained of may be considered and corrected by the Supreme Court of Georgia.

DESIGNATION OF RECORD

Plaintiff in error specifies as material to the consideration of the questions herein presented the following portions of the record:

1. The petition of Angelo Herndon for the writ of habeas corpus, together with all entries thereon, and including Exhibits "A," "B," and "C" attached thereto and forming part thereof.

2. The writ of habeas corpus issued in said case, dated October 28, 1935.

3. The Special Demurrer and Motion to Strike, filed by the respondent, together with all entries and order thereon.

4. The answer filed by respondent, together with all entries thereon, and including Exhibit "A" attached thereto.

5. The Order and Judgment in said case, dated Dec. 7, 1935, signed by "Hugh M. Dorsey, Judge Superior Court Atlanta Circuit."

Plaintiff in error shows that the Supreme Court, and not the Court of Appeals, has jurisdiction of this writ of error

for the reason that the same seeks to review an order and judgment on a petition for habeas corpus, the same being an extraordinary remedy and falling within the jurisdiction of the Supreme Court under the Constitution of this State.

J. W. LeCraw, John H. Hudson, John A. Boykin, Sol. Genl., Attorneys for Plaintiff in Error. P. O. Address: Room 315, Courthouse, Atlanta, Ga.

[fol. 27] ORDER SETTLING BILL OF EXCEPTIONS

I do certify that the foregoing bill of exceptions is true and contains and specifies all of the evidence and specifies all of the record material to a clear understanding of the errors complained of, and the clerk of the superior court of Fulton County is hereby directed to certify the same as such and cause it to be transmitted to the current term of the Supreme Court of Georgia, that the errors alleged to have been committed may be considered and corrected.

This 11th day of December, 1935.

Hugh M. Dorsey, Judge, Superior Court, Atlanta Circuit.

Due and legal service of the within bill of exceptions and the certificate thereon is hereby acknowledged.

This 11 day of December, 1935.

Whitney North Seymour, Sutherland, Tuttle & Brennan, Attorneys for Defendant in Error. P. O. Address: First Natl. Bank Bldg., Atlanta, Ga.

[File endorsement omitted.]

[fol. 28] Clerk's certificate to foregoing paper omitted in printing.

Filed in office December 14, 1935. K. C. Bleckley, C. S. C. Ga.

[fol. 29] IN SUPERIOR COURT OF FULTON COUNTY

Cross-Bill of Exceptions—Filed December 14, 1935

Be it Remembered that on the 12th day of November, 1935, there came on to be heard, in the superior court of

said county before the Honorable Hugh M. Dorsey, Judge of said court, then and there presiding, the case of Angelo Herndon v. J. I. Lowry, sheriff of Fulton County, being a petition for the writ of habeas corpus, wherein the said Angelo Herndon alleged that he was being unlawfully restrained of his liberty by the said respondent, and upon which petition the said Judge of said court had previously entered an order requiring the said respondent to produce the body of Angelo Herndon before him in said court on the said November 12, 1935, to be disposed of as the law directs.

Be it Further Remembered that at the time and place so fixed, the said respondent produced the said Angelo Herndon and filed his answer to said writ of habeas corpus.

Be it Further Remembered that the case then proceeded to hearing before the said Judge upon the petition for habeas corpus and the answer of the respondent. The petitioner tendered in evidence the record of the brief of the evidence which had been adduced at the trial of the case of the State of Georgia v. Angelo Herndon in Fulton Superior Court, upon Indictment No. 37,812, referred to in Paragraph 5 of the petition for habeas corpus in this case, and set forth in full as "Exhibit C" to the said petition for habeas corpus, and the said evidence was admitted by the Court. Counsel for respondent then conceded in open court that petitioner was held in custody by respondent under the sentence, set forth as "Exhibit A" to the petition. Respondent introduced in evidence the motion to Quash Indictment in Indictment No. 37,812, and the order upon same. The said document appears as "Exhibit A" to the answer of respondent in the present case.

No further evidence was introduced at said hearing, but the same proceeded to argument upon the legal questions [fol. 30] presented by the said petition for habeas corpus and the answer of the respondent. At the conclusion of said hearing, the said Judge reserved his decision thereon until a subsequent date.

Be it Further Remembered that on December 7, 1935, the said Judge of said court rendered his decision upon the question, and held and adjudged as follows:

DECISION

That the statute of the State of Georgia under which petitioner was indicted, as construed and applied in this

case, was in conflict with the Fourteenth Amendment of the Constitution of the United States, and with Article 1, Section 1, Paragraph 3, of the Constitution of the State of Georgia in that it is too vague and indefinite to provide a sufficiently ascertainable standard of guilt, and that petitioner's conviction and sentence were therefore unconstitutional, illegal, void and of no effect.

The Court by his order further stated that the contentions of applicant, other than that above stated, were not sustained.

ASSIGNMENTS OF ERROR

To the said last named order and judgment of the Court, to the effect that contentions of applicant, other than that sustained in the judgment of the trial court as above set out, were not sustained, the petitioner, Angelo Herndon, then and there excepted and here and now excepts and assigns the same as error, and says that the Judge of the said court erred in that he should have sustained the contentions of petitioner as follows:

(A) The said Court erred, as petitioner contends, in not sustaining petitioner's contention that Section 56 of the Georgia Penal Code was unconstitutional, illegal and void by reason of the fact that it is in conflict with the Fourteenth Amendment of the Constitution of the United States in the following particulars:

(1) It denies and unduly restricts freedom of speech, and of assembly.

(2) It is too vague and indefinite to provide a sufficiently ascertainable standard of guilt.

[fol. 31] (B) That the said Court erred, as petitioner contends, in not sustaining petitioner's contention that Section 56 of the Georgia Penal Code, as construed and applied to the petitioner by the Supreme Court of Georgia, was unconstitutional, illegal, and void by reason of the fact that as thus construed and applied it is in conflict with the Fourteenth Amendment of the Constitution of the United States in the following particular:

(1) It denies and unduly restricts petitioner's freedom of speech and of assembly.

(C) The said Court erred, as petitioner contends, in not sustaining petitioner's contention that Section 56 of the Georgia Penal Code, on its face, and as construed and applied to petitioner by the Supreme Court of Georgia, is in conflict with Article 1, Section 1, Paragraph 3, of the Constitution of the State of Georgia, which provides that "No person shall be deprived of life, liberty or property, except by due process of law," in that it denies and unduly restricts the right of petitioner and others to freedom of speech and assembly.

(D) The said Court erred, as petitioner contends, in not sustaining petitioner's contention that Section 56 of the Georgia Penal Code, on its face, and as construed and applied to petitioner by the Supreme Court of Georgia, was in conflict with Article 1, Section 1, Paragraph 15, of the Constitution of the State of Georgia, which provides that:

"No law shall ever be passed to curtail, or restrain the liberty of speech, or of the press; any person may speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that liberty."

(E) The said Court erred, as petitioner contends, in not sustaining petitioner's contention that Section 56 of the Georgia Penal Code, on its face, and as construed and applied to petitioner by the Supreme Court of Georgia, was in conflict with Article 1, Section 1, Paragraph 24, of the Constitution of the State of Georgia, which provides that:

[fol. 32] "The people have the right to assemble peaceably for their common good and to apply to those vested with the powers of government for redress of grievances by petition or remonstrance."

To all of which errors alleged by petitioner to have been committed by the said Judge, petitioner then and there excepted, and here and now excepts, and assigns the same as error, and says that the said Judge erred in not sustaining petitioner's contentions in each of the respects herein designated.

And Now Comes the said Angelo Herndon, petitioner, within the time allowed by law, and within twenty days from the date of the order and rulings and judgment complained of, and names himself as plaintiff in error in this

cross bill of exceptions, and the said J. I. Lowry, Sheriff of Fulton County, as defendant in error herein, and presents this cross bill of exceptions to the Honorable Hugh M. Dorsey, Judge of the said Court, as aforesaid, and prays that the same may be signed and certified in order that the errors complained of may be considered and corrected by the Supreme Court of Georgia.

DESIGNATION OF RECORD

Plaintiff in error specifies no additional portions of the record as necessary to the consideration of the questions herein presented, all of the material portions of the record having heretofore been specified by plaintiff in error in the bill of exceptions heretofore certified by J. I. Lowry, Sheriff of Fulton County, in which the said J. I. Lowry designated himself as plaintiff in error.

Plaintiff in error shows that the Supreme Court, and not the Court of Appeals, has jurisdiction of this cross bill of exceptions and writ of error for the reason that the same seeks to review an order and judgment on a petition for habeas corpus, the same being an extraordinary remedy and falling within the jurisdiction of the Supreme Court under the Constitution of this State, and for the further reason that the said petition seeks to draw in question the constitutionality of a statute of this State.

[fol. 33] Whitney North Seymour, Sutherland, Tuttle & Brennan, Attorneys for Plaintiff in Error.

ORDER SETTLING BILL OF EXCEPTIONS

I do certify that the foregoing cross bill of exceptions is true and contains and specifies all of the evidence, and specifies all of the record material to a clear understanding of the errors complained of, and the Clerk of the Superior Court of Fulton County is hereby directed to certify the same as such, and cause it to be transmitted to the current term of the Supreme Court of Georgia, that the errors alleged to have been committed may be considered and corrected.

This 14th day of December, 1935.

Hugh M. Dorsey, Judge, Superior Court, Atlanta Circuit.

Due and legal service of the within cross bill of exceptions and the certificate thereon is hereby acknowledged.

This 14 day of December, 1935.

J. W. LeCraw, John H. Hudson, John A. Boykin, Sol. Genl., Attorneys for Defendant in Error.

[File endorsement omitted.]

[fol. 34] Clerk's certificate to foregoing paper omitted in printing.

Filed in office December 19, 1935. K. C. Bleckley, C. S. C. A.

[fol. 35] IN SUPREME COURT OF GEORGIA

Nos. 11216 and 11226

LOWRY, Sheriff,

v.

HERNDON et vice versa

OPINION—June 13, 1936

By the Court.

ATKINSON, Justice:

1. It is declared by statute: "Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection." Code of 1933, § 26-902. In Herndon v. State, 178 Ga. 832 (174 S. E. 597), as explained on motion for rehearing in Herndon v. State, 179 Ga. 597, 598, 600 (176 S. E. 620), the statute was construed: "It is immaterial whether the authority of the State was in danger of being subverted or that an insurrection actually occurred or was impending. • • • Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time,

but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce."

(a) Neither as expressed, nor as it was construed by this court, is the above statute void, as violative of the fourteenth amendment of the Federal constitution (Code of 1933, § 1-815), for the alleged reasons (1) that it "denies and unduly restricts freedom of speech and of assembly;" (2) that "it is too vague and indefinite to provide a sufficiently ascertainable standard of guilt."

(b) Neither is the statute so construed and applied void as violative of the provisions of article 1, section 1, paragraph 3, of the constitution of the State of Georgia (§ 2-103) which provides: "No person shall be deprived of life, lib-[fol. 36] erty, or property, except by due process of law," for the same above alleged reasons.

(c) Neither is the statute so construed and applied void as violative of the provisions of article 1, section 1, paragraph 15, of the constitution of the State (§ 2-115). "No law shall ever be passed to curtail, or restrain the liberty of speech, or of the press; any person may speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that liberty."

(d) Neither is the statute as so construed and applied void as violative of the provisions of article 1, section 1, paragraph 24, of the constitution of the State (§ 2-124): "The people have the right to assemble peaceably for their common good, and to apply to those vested with the powers of government for redress of grievances, by petition or remonstrance." The foregoing provisions of the constitutions do not guarantee freedom of speech or the right of assembly in the perpetration of a crime.

2. After conviction of attempting to incite insurrection under the foregoing statute, and affirmance of the final judgment on writ of error to this court, and detention by the sheriff, the court erred, in habeas-corpus proceedings based on alleged unconstitutionality of the statute, in holding the statute violative of the fourteenth amendment to the constitution of the United States (Code of 1933, §1-815), and

also of article 1, section 1, paragraph 3, of the constitution of the State (§2-103), in that, relatively to both provisions of the State and Federal constitutions, the statute "is too vague and indefinite to provide a sufficiently ascertainable standard of guilt."

3. The court did not err in refusing to hold the statute void as violative of the several provisions of the State and Federal constitutions on the several other grounds of attack urged against them, as specifically stated in the first division, to which the cross-bill of exceptions relates.

4. Under the pleadings and the evidence, which embraced the record on the trial that resulted in the conviction, the [fol. 37] court erred, in the habeas-corpus proceeding, in refusing to remand the prisoner to the custody of the officers.

Judgment reversed on the main bill of exceptions, and affirmed on the cross-bill. All the Justices concur, except Russell, C. J., not participating.

Beck, P. J., concurs in the judgment.

[fol. 38] IN SUPREME COURT OF GEORGIA

11216

J. I. LOWRY, Sheriff,

v.

ANGELO HERNDON

JUDGMENT—June 13, 1936

This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed because the court erred in holding Penal Code § 56, as construed by this case, unconstitutional, and ordering the release of the petitioner Herndon.

All the Justices concur, except Russell, C. J., not participating.

Beck, P. J., concurs in the judgment.

[fols. 39-73] IN SUPREME COURT OF GEORGIA

11226

ANGELO HERNDON

v.

J. I. LOWRY, Sheriff

JUDGMENT—June 13, 1936

This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

All the Justices concur, except Russell, C. J., not participating.

Beck, P. J., concurs in the judgment.

[fol. 74] SUPREME COURT OF THE UNITED STATES

No. 1

[Title omitted]

PETITION FOR APPEAL—Filed September 11, 1936

To the Honorable the Supreme Court of the United States:

Considering himself aggrieved by the final decision of the Supreme Court of the State of Georgia in the above-entitled cause, the appellant herein, Angelo Herndon, hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond as security for costs thereon, and for an order approving said bond.

ASSIGNMENT OF ERRORS

And the said Angelo Herndon assigns the following errors in the record and proceedings in the said case:

1. The court below erred in holding that Section 56 of the Penal Code of Georgia is not void under the due process clause of the fourteenth amendment because it is too vague

and indefinite to provide a sufficiently ascertainable standard of guilt.

2. The Court below erred in holding that Section 56 of the Penal Code of Georgia, as construed and applied by the Supreme Court of Georgia in appellant's case, is not void as violative of appellant's rights under the due process clause of the fourteenth amendment because it is too vague and indefinite to provide a sufficiently ascertainable standard of guilt.

[fol. 75] 3. The Court below erred in holding that Section 56 of the Penal Code of Georgia, as expressed and as construed and applied to appellant, is not void under the fourteenth amendment because it is too vague and indefinite to provide a sufficiently ascertainable standard of guilt.

4. The Court below erred in holding that Section 56 of the Penal Code of Georgia, as construed and applied to appellant, is not so uncertain that its application to appellant violated its rights under the due process clause of the fourteenth amendment.

5. The Court below erred in holding that Section 56 of the Penal Code of Georgia, as construed and applied to appellant, did not deprive appellant of his liberty, without due process of law, in violation of the fourteenth amendment.

6. The Court below erred in holding that the Superior Court of Fulton County erred in habeas corpus proceedings based on alleged unconstitutionality of section 56 of the Penal Code of Georgia, in holding the statute as construed and applied to appellant violative of his rights under the fourteenth amendment.

7. The Court below erred in holding that under the pleadings and evidence, which embraced the record on the trial that resulted in appellant's conviction, the Superior Court of Fulton County erred in the habeas corpus proceeding in refusing to remand the appellant to the custody of the officers for the purpose of serving his sentence.

8. The Court below erred in holding that petitioner's conviction and sentence of violating section 56 of the Penal Code of Georgia was not unconstitutional, illegal, void and

of no effect under the due process clause of the fourteenth amendment.

9. The Court below erred in reversing the judgment of the superior court of Fulton County in habeas corpus proceedings directing the eventual discharge of appellant from custody.

10. The Court below erred in failing to direct the discharge of appellant from custody.

11. The Court below erred in directing that appellant be remanded to custody.

[fol. 76] PRAYER FOR REVERSAL

For which errors the appellant, Angelo Herndon, prays that the said judgment of the Supreme Court of the State of Georgia, dated June 13, 1936, reversing the judgment of the Superior Court of Fulton County, Georgia, be reversed and a judgment rendered in favor of the said appellant setting aside his conviction, releasing him from custody, and directing the cancellation and return of his bail, and for costs and for all other proper relief.

Dated, September 1, 1936.

Whitney North Seymour, Attorney for Petitioner and Appellant.

[File endorsement omitted.]

[fol. 77] SUPREME COURT OF THE UNITED STATES

No. 1

[Title omitted]

ORDER ALLOWING APPEAL—Filed September 11, 1936

The appellant in the above-entitled cause having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from a judgment made and rendered in the above-entitled cause by the Supreme Court of the State of Georgia, on June 13, 1936, reversing the judgment of the superior court of Fulton County, Georgia, rendered December 7, 1935, and from each and every part

of said judgment, and having presented and filed his petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It Is Now Hereby Ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Georgia in the above-entitled cause, as provided by law, and it is further ordered that the clerk of the Supreme Court of the State of Georgia shall prepare and certify a transcript of the record, proceedings, and judgment in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said court within forty days from this date;

And It Is Further Ordered that security for costs on appeal be fixed in the sum of Five Hundred Dollars.

Dated September 10th, 1936.

Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia.

[fol. 78] Supreme Court of Georgia. No. 11216. Lowry v. Herndon

It is further ordered that the mandate of this court be withheld and be not returned to the trial court until 10 days after the final decision on this appeal by the United States Supreme Court.

This, Sept. 10, 1936.

Richard B. Russell, Chief Justice Supreme Court of the State of Georgia.

[File endorsement omitted.]

[fol. 79] Citation, in usual form, showing service on J. I. Lowry, filed Sept. 11, 1936, omitted in printing.

[fols. 80-129] Bond on appeal for $500.00, approved and filed September 18, 1936, omitted in printing.

[fol. 130] SUPREME COURT OF THE UNITED STATES

No. 2

[Title omitted]

PETITION FOR APPEAL—Filed September 11, 1936

To the Honorable The Supreme Court of the United States:

Considering himself aggrieved by the final decision of the Supreme Court of the State of Georgia in the above-entitled cause, the appellant herein, Angelo Herndon, hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond as security for costs thereon, and for an order approving said bond.

ASSIGNMENT OF ERRORS

And the said Angelo Herndon assigns the following errors in the record and proceedings in the said case:

1. The Court below erred in holding that section 56 of the Penal Code of Georgia is not void by reason of the fact that it is in conflict with the due process clause of the fourteenth amendment in the following particulars:

(a) It denies and unduly restricts freedom of speech and of assembly;

(b) It is too vague and indefinite to provide a sufficiently ascertainable standard of guilt.

2. The court below erred in holding that section 56 of the Penal Code of Georgia, as construed and applied to appellant, is not void by reason of the fact that as thus construed [fol. 131] and applied it is in conflict with the due process clause of the fourteenth amendment to the constitution of the United States in the following particulars:

(a) It denies and unduly restricts freedom of speech and of assembly.

3. The court below erred in holding that section 56 of the Penal Code of Georgia is not void by reason of the fact that it is in conflict with the fourteenth amendment in the following particulars:

(a) It denies and unduly restricts freedom of speech and of assembly;

(b) It is too vague and indefinite to provide a sufficiently ascertainable standard of guilt.

4. The Court below erred in holding that section 56 of the Penal Code of Georgia, as construed and applied to appellant, is not void by reason of the fact that as thus construed and applied it is in conflict with the fourteenth amendment to the constitution of the United States in the following particulars:

(a) It denies and unduly restricts freedom of speech and of assembly;

(b) It is too vague and indefinite to provide a sufficiently ascertainable standard of guilt.

5. The court below erred in holding that section 56 of the Penal Code of Georgia does not deny and unduly restrict appellant's freedom of speech and of assembly in violation of the due process clause of the fourteenth amendment.

6. The court below erred in holding that section 56 of the Penal Code of Georgia, as construed and applied to appellant, does not deny and unduly restrict appellant's freedom of speech and of assembly, in violation of the due process clause of the fourteenth amendment.

7. The court below erred in holding that the superior court of Fulton County did not err in refusing to hold section 56 of the Penal Code of Georgia void as violative of [fol. 132] the fourteenth amendment on the several grounds of attack which were the subject matters of the cross bill of exceptions.

8. The court below erred in failing to hold that the superior court of Fulton County erred in refusing to hold section 56 void as violative of the fourteenth amendment on the several grounds of attack which were the subject-matters of the cross bill of exceptions.

9. The court below erred in holding that under the pleadings and evidence, which embraced the record on the trial that resulted in appellant's conviction, the superior court of Fulton County erred in habeas corpus proceedings in

refusing to remand the appellant to the custody of the officers for the purpose of serving his sentence.

10. The court below erred in holding that petitioner's conviction and sentence of violating section 56 of the Penal Code of Georgia was not unconstitutional, illegal, void and of no effect under the due process clause of the fourteenth amendment.

11. The court below erred in affirming so much of the judgment of the superior court of Fulton County as failed to sustain appellant's attack upon section 56 of the Penal Code of Georgia, as construed and applied to him.

12. The court below erred in failing to reverse so much of the judgment of the superior court of Fulton County as failed to sustain attacks upon appellant's conviction under section 56 of the Penal Code of Georgia, as construed and applied to him.

13. The court below erred in failing to direct the discharge of appellant from custody.

14. The court below erred in directing that appellant be remanded to custody.

Prayer for Reversal

For which errors the appellant, Angelo Herndon, prays that the said judgment of the Supreme Court of the State of Georgia, dated June 13, 1936, affirming in part the judgment of the superior court of Fulton County, Georgia, be reversed and a judgment rendered in favor of the said appellant setting aside his conviction, releasing him from [fol. 133] custody, and directing the cancellation and return of his bail, and for costs and for all other proper relief.

Dated September 1, 1936.

Whitney North Seymour, Attorney for Petitioner and Appellant.

[File endorsement omitted.]

[fol. 134] SUPREME COURT OF THE UNITED STATES

No. 2

[Title omitted]

ORDER ALLOWING APPEAL—Filed September 11, 1936

The appellant in the above-entitled cause having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from a judgment made and rendered in the above-entitled cause by the Supreme Court of the State of Georgia, on June 13, 1936, affirming in part the judgment of the Superior Court of Fulton County, Georgia, rendered December 7, 1935 and from each and every part of said judgment, and having presented and filed his petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is Now Hereby Ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Georgia in the above-entitled cause, as provided by law, and it is further ordered that the clerk of the Supreme Court of the State of Georgia shall prepare and certify a transcript of the record, proceedings, and judgment in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said Court within forty days from this date;

And it is Further Ordered that security for costs on appeal be fixed in the sum of Five Hundred Dollars.

Dated September 10th, 1936.

Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia.

Supreme Court of Georgia. No. 11226. Herndon v. Lowry

[fol. 135] It is further ordered that the mandate of this court be withheld and be not returned to the trial court until ten days after the final decision on this appeal by the United States Supreme Court.

This September 10, 1936.

Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia.

[File endorsement omitted.]

[fol. 136] Citation, in usual form, showing service on J. I. Lowry, filed September 11, 1936, omitted in printing.

[fols. 137-151] Bond on appeal for $500.00, approved and filed September 18, 1936, omitted in printing.

[fol. 152] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed September 17, 1936

To the Clerk of the Supreme Court of Georgia:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States pursuant to appeals duly allowed in the above-entitled causes, and to include in such transcript of record the following, to wit:

1. The petition for habeas corpus including exhibits.
2. Answer of respondent.
3. Special demurrer and motion to strike.
4. Exhibits offered at habeas corpus hearing.[1]
5. Opinion and judgment of the Superior Court of Fulton County granting the writ of habeas corpus.
6. Bill of exceptions filed on behalf of the sheriff of Fulton County.
7. Cross bill of exceptions filed on behalf of appellant.
8. Opinion and judgment of the Supreme Court of Georgia rendered June 13, 1936.

[fol. 153] 9. Appellant's statements of jurisdiction.

10. Appellant's petitions for appeal, assignments of errors and prayers for reversal.

---

[1] The record of appellant's trial which was offered in evidence at the hearing need be included in the record only once and if included as Exhibit C to the petition for habeas corpus need not be duplicated, the record containing merely a reference to the fact that it appears as Exhibit C to the petition.

11. Orders allowing appeals dated September 10, 1936.
12. Copies of citations issued upon appeals.
13. Copy of bonds for costs.
14. Copy of appellant's statements directing attention to the provisions of Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States.
15. Proof of service of the foregoing papers numbered 9, 10, 11, 12 and 14.
16. This præcipe and acknowledgment of service.

Said transcript to be prepared as required by law and by the Rules of the Supreme Court of Georgia and the Rules of the Supreme Court of the United States, and to be filed in the office of the clerk of the Supreme Court of the United States at Washington, D. C., on or before the return day of the citations.

Dated September 15, 1936.

Whitney North Seymour, Attorney for Appellant,
120 Broadway, New York, N. Y.

Service of the above præcipe accepted and acknowledged this 17th day of September, 1936.

John A. Boykin, Solicitor General of Fulton County, Ga.

[File endorsement omitted.]

[fol. 154] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 155] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed October 20, 1936

Comes now the appellant in the above entitled causes and adopts his assignments of errors as his statement of the points to be relied upon in this Court.

The appellant thinks the following portions of the record are necessary to a consideration of these points:

1. The petition for habeas corpus including exhibits.
2. Answer of respondent.

3. Special demurrer and motion to strike.
4. Exhibits offered at habeas corpus hearing.[1]
[fol. 156] 5. Opinion and judgment of the Superior Court of Fulton County granting the writ of habeas corpus.
6. Bill of exceptions filed on behalf of the Sheriff of Fulton County.
7. Cross bill of exceptions filed on behalf of appellant.
8. Opinion and judgment of the Supreme Court of Georgia rendered June 13, 1936.
9. Appellant's statements of jurisdiction.
10. Appellant's petitions for appeal, assignments of errors and prayers for reversal.
11. Orders allowing appeals dated September 10, 1936.
12. Copies of citations issued upon appeals.
13. Copy of bonds for costs.
14. Copy of appellant's statements directing attention to the provisions of Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States.
15. Proof of service of the foregoing papers numberes 9, 10, 11, 12 and 14.
16. Appellant's præcipe and acknowledgment of service.

New York, N. Y., October 19, 1936.
Whitney North Seymour, Attorney for Appellant,
120 Broadway, New York, N. Y.

[fol. 157] State of New York,
County of New York, ss:

Joseph Romer being duly sworn, deposes and says:
I am over the age of twenty-one years and reside at 1900 51st Street in the Borough of Brooklyn, City and State of New York.
On October 19, 1936 I served a copy of appellant's "statement of the points on which he intends to rely and of the parts of the record which he thinks necessary for the consideration thereof" upon the appellee by mailing a copy

[1] The record of appellant's trial which was offered in evidence at the hearing need be included in the record only once and if included as Exhibit C to the petition for habeas corpus need not be duplicated, the record containing merely a reference to the fact that it appears as Exhibit C to the petition.

thereof by registered mail in a securely sealed and duly addressed envelope to the Solicitor General of Fulton [fol. 158] County, Georgia at Atlanta, Georgia. Said copy was mailed by depositing the same in a branch post office situated at 30 Church Street, New York, N. Y.

Joseph Romer.

Sworn to before me this 19th day of October, 1936. Joseph Giordano, Notary Public. Kings Co. Clk's No. 602 Reg. No. 7262. N. Y. Co. Clk's No. 627 Reg. No. 7G355. Commission expires March 30, 1937. (Seal of Joseph Giordano, Notary Public, Kings County, N. Y.)

[fol. 159] [File endorsement omitted.]

Endorsed on cover: File Nos. 41,014, 41,015. Georgia Supreme Court. Term No. 474. Angelo Herndon, appellant, vs. J. I. Lowry, Sheriff of Fulton County, Georgia. Term No. 475. Angelo Herndon, appellant, vs. J. I. Lowry, Sheriff of Fulton County, Georgia. Filed October 20, 1936. Term Nos. 474, O. T., 1936, 475, O. T., 1936.

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CHARLES ELMORE CROP
CLER

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

Nos. 474 and 475

ANGELO HERNDON,

Appellant,

vs.

J. I. LOWRY, SHERIFF OF FULTON COUNTY.

APPEALS FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

STATEMENT AS TO JURISDICTION.

WHITNEY NORTH SEYMOUR,
Counsel for Appellant.

HERBERT T. WECHSLER,
W. A. SUTHERLAND,
WALTER GELLHORN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

Nos. 474 and 475

ANGELO HERNDON,

Appellant,

vs.

J. I. LOWRY, SHERIFF OF FULTON COUNTY.

APPEALS FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 of this Court appellant submits herewith his statement showing the basis upon which it is contended that this Court has jurisdiction upon appeal to review the judgments in the above-entitled causes.

Opinions Below.

Neither the opinion of the Supreme Court of Georgia nor that of the court of original jurisdiction has been officially reported. The former appears at page 35 and the latter at page 20 of the Record and both are appended to this statement. The earlier opinion of the Supreme Court of Georgia on appeal from the judgment of conviction is

reported in 178 Ga. 832, and its opinion upon the denial of a petition for rehearing is reported in 179 Ga. 597. The opinion of this Court dismissing for want of jurisdiction the appeal from the judgment affirming the judgment of conviction is reported in 295 U. S. 441. The dissenting opinion of Mr. Justice Cardozo (concurred in by Mr. Justice Brandeis and Mr. Justice Stone) appears in 295 U. S. 446. This Court's denial of a petition for rehearing is recorded in 296 U. S. 661.

Jurisdiction.

This Court has jurisdiction under § 237 (a) of the Judicial Code as amended by the Acts of February 13, 1925, January 31, 1928 and April 26, 1928, to review the judgment of the court below upon appeal.

(1)

THE APPEAL IS TIMELY.

The judgment of the Supreme Court of Georgia was entered June 13, 1936. The petition for the allowance of an appeal was presented to Hon. Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia, on September 10, 1936, and was allowed by him on September 10, 1936.

(2)

THE VALIDITY OF A STATE STATUTE UNDER THE FEDERAL CONSTITUTION WAS DRAWN INTO QUESTION AND THE DECISION WAS IN FAVOR OF ITS VALIDITY.

(a)

The Statute.

The statute, the validity of which as construed and applied to appellant was drawn into question by proceedings

on habeas corpus, is Section 56 of the Penal Code of Georgia (Acts 1866, p. 152), which provides:

> Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection.[1]

The statute was construed by the Supreme Court of Georgia in its opinion upon the petition for rehearing of

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[1]The punishment for an attempt to incite insurrection is provided by Section 57 of the Penal Code (Acts 1866, pp. 152, 153, as amended by Acts 1871, pp. 19, 20) as follows:

> Any person convicted of the offense of insurrection, or an attempt to incite insurrection, shall be punished with death; or, if the jury recommend to mercy, confinement in the penitentiary for not less than five nor more than twenty years.

Insurrection is defined in Section 55 of the Penal Code (Acts 1866, pp. 152, 153) as follows:

> Insurrection shall consist in any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested or intended to be manifested by acts of violence.

[2]In its original opinion affirming the judgment of conviction the statute was construed somewhat differently, as follows: "• • • Force must have been contemplated but, as said above, the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. • • • Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but it would be sufficient that he intended it to happen at any time, as a result of his influence, by those whom he sought to incite. • • •" (178 Ga. 855). The construction of the statute by the trial court differed radically from both constructions on appeal. The jury was charged

the judgment affirming appellant's conviction[2] in the following manner:

> "Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it have been necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would (be) sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce." (179 Ga. 600.)

In holding that appellant had violated the statute and affirming his conviction thereunder (178 Ga. 832, 179 Ga. 597) the Supreme Court of Georgia construed the statute to apply to the situation presented by the facts of this case.

The validity of the statute as thus construed and as applied to the facts of appellant's case under the Fourteenth Amendment was drawn in question in the present habeas corpus proceeding and the decision was in favor of its validity.

(b)

Nature of the Case.

Appellant, a young Negro, petitioned for *habeas corpus* in the Superior Court of Fulton County, Georgia, his peti-

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[2] "• • • that advocacy, however reprehensible morally, is not sufficient to convict the defendant where there is no evidence to indicate the advocacy would be acted upon immediately. In order to convict the defendant, gentlemen, it must appear clearly by the evidence that immediate serious violence against the State of Georgia was to be expected or was advocated" (R. 13, Exhibit C to petition for *habeas corpus*).

tion alleging that he was unlawfully detained and held in custody by the appellee, J. I. Lowry, as sheriff of the county, the sole claim of authority under which he was held being a judgment of the Superior Court of Fulton County reciting his conviction of "attempting to incite insurrection" in violation of section 56 of the Georgia Penal Code and sentencing him to confinement in the Fulton County jail until his removal therefrom for imprisonment at hard labor in the Georgia penitentiary or some other place designated by the Governor for not less than eighteen nor more than twenty years (R. 7). Attached to the petition as Exhibit C and incorporated therein was a portion of the record on the appellant's appeal from the judgment of conviction to the Supreme Court of the United States, containing a full statement of the evidence upon which the judgment and other proceedings at the trial were based. The petition alleged that there "is nothing in the evidence upon which petitioner's conviction is based to show that there was a clear and present danger that violence or other unlawful acts would result from petitioner's actions, or that petitioner advocated violence or other unlawful acts, or that violence or other unlawful acts would probably result from any of petitioner's actions, or that whatever violence or other unlawful acts might result from any of petitioner's actions would be likely to occur in the immediate or forseeable future or at any given time" (R. 2). The indictment upon which the petitioner was tried, the judgment of conviction and the sentence of imprisonment were all alleged to be void and the detention to be illegal and unconstitutional because of the unconstitutionality of Section 56 of the Georgia Penal Code. The petitioner contended that the Statute is invalid on its face and as construed and applied to the facts of his case by the Supreme Court of Georgia, by reason of the fact that as written and "as thus con-

strued and applied it is in conflict with the Fourteenth Amendment to the Constitution of the United States in the following particulars: (a) It denies and unduly restricts petitioner's freedom of speech and of assembly" and "(b) It is too vague and indefinite to provide a sufficiently ascertainable standard of guilt" (R. 3). The invalidity of the statute as construed and applied was also claimed under various provisions of the State constitution which are not now material. Finally, the petitioner alleged that although the judgment under color of which he was held in custody had been affirmed by the Supreme Court of Georgia, a petition for rehearing denied by that court, an appeal to this Court dismissed for want of jurisdiction and a petition for rehearing denied by this Court, there has been no adjudication in his case by any court of the validity under the constitutions of the United States and of the State of Georgia, of the statute under which he was convicted.

The writ issued. The appellee answered, demurred specially to the portion of the petition incorporating the evidence contained in the record on appeal, and, in addition, moved to strike the allegation with respect to such incorporation, as well as the exhibit itself (R. 15). At the final hearing upon the petition and answer the portion of the record above referred to was identified, conceded by appellee to be a correct statement of the evidence presented at the trial, and was received in evidence over his objection (R. 23, appellee's bill of exceptions to Supreme Court of Georgia). The only evidence offered by appellee was appellant's motion, before trial, to quash the indictment, which was received. The Court denied appellee's motion to strike, overruled his special demurrer and objection to the admission of the trial record and held (1) "That the applicant's contention that this law in question as construed and applied in his case is in conflict with the Fourteenth Amend-

ment of the Constitution of the United States, in that it is too vague and indefinite to provide a sufficiently ascertainable standard of guilt; and that it is also in conflict with article 1, section 1, paragraph 3, of the Constitution of the State of Georgia, for the same reason, and that his conviction and sentence are unconstitutional, illegal, void and of no effect, be and the same is hereby sustained;" (2) "Contentions of applicant other than that above stated are not sustained" (R. 20). Appellant was ordered released unless an appeal were filed, and in that event, his release was ordered on bail (R. 21).

Appellee appealed to the Supreme Court of Georgia, assigning as error the rulings on his demurrer, motion and objection and the decision that the statute is invalid. As required by the Georgia practice to bring up for review the other grounds of invalidity urged in the petition and overruled by the Superior Court, appellant filed a cross-appeal, assigning as error the decision adverse to those contentions. The two appeals were docketed as separate cases. In a single opinion, the Supreme Court of Georgia reversed on appellee's appeal and affirmed on appellant's appeal. The opinion stated (a) "Neither as expressed, nor as it was construed by this Court," is the statute void "as violative of the Fourteenth Amendment of the Federal Constitution" for the alleged reasons (1) that it "denies and unduly restricts freedom of speech and of assembly;" (2) that "it is too vague and indefinite to provide a sufficiently ascertainable standard of guilt;" (b) "Neither is the statute so construed and applied void as violative" of various provisions of the State constitution invoked by appellant; (c) The decision of the superior court that the statute is unconstitutional under the fourteenth amendment and the provisions of the State constitution on the ground that it is "too vague and indefinite to provide a sufficiently ascer-

tainable standard of guilt" was erroneous; (d) There was no error "in refusing to hold the statute void as violative of the several provisions of the State and Federal constitutions for the several other grounds of attack urged against them • • • to which the cross bill of exceptions relates;" (e) "Under the pleadings and evidence, which embraced the record on the trial that resulted in the conviction, the Court erred in the *habeas corpus* proceeding in refusing to remand the prisoner to the custody of the officers." (See Appendix B.)

(c)

Federal Questions Were Properly Raised and were Decided Adversely to Appellant.

(1) Appellant's petition for *habeas corpus* properly presented his contention that the statute under which he was convicted as written and as construed and applied by the Supreme Court of Georgia in affirming his conviction conflicts with the Fourteenth Amendment to the Constitution of the United States in the following respects:

(1) It denies and unduly restricts freedom of speech and of assembly;

(2) It is too vague and indefinite to provide a sufficiently ascertainable standard of guilt.

The remedy of *habeas corpus* was available under the Georgia practice after trial and conviction where the constitutional questions were not passed upon in the criminal case.

Griffin v. *Eaves*, 114 Ga. 65.

Accordingly, the questions would be presented to this Court even had they not been decided below. *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282.

(2) It is, however, unnecessary for this Court to inquire into the propriety of the procedure under the State practice because all questions on these appeals were decided by the Superior Court of Fulton County and, upon appeal, by the Supreme Court of Georgia. The Superior Court considered the case on the merits and decided that appellant's contention that the statute as construed and applied was invalid under the fourteenth amendment because it denied and unduly restricted freedom of speech and assembly was without merit and that his contention that the statute was invalid as construed and applied because it is too vague and indefinite to provide a sufficiently ascertainable standard of guilt was well founded. The Supreme Court held that the superior court correctly decided against the first contention and incorrectly decided in favor of the second. The validity of the statute was therefore sustained on both points on the merits and the judgment reversed on appellee's bill of exceptions and affirmed on appellant's cross-bill of exceptions.

Accordingly, both questions are properly before this Court.[3] *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 60, 70-71; *Nashville C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 264; *Cumberland Coal Co.* v. *Board*, 284 U. S. 23, 24; *Home Insurance Co.* v. *Dick*, 281 U. S. 397, 407; *Grayson* v. *Harris*, 267 U. S. 352, 358; *Illinois Central R. R. Co.* v. *Kentucky*, 218 U. S. 551, 556; *St. Louis, Iron Mountain and S. Ry.* v. *Hesterly*, 228 U. S. 702, 704; *Rogers* v. *Hennepin County*, 240 U. S. 184, 188; *Louisville & Nashville Ry.* v. *Higdon*, 234 U. S. 592, 597-8; *Collins* v. *Texas*, 223 U. S. 288,

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[3] *Doyle* v. *Atwell*, 261 U. S. 590 is not in point because in that case the State Court had held that the remedy of *habeas corpus* was not available and this Court regarded that as an adequate non-Federal ground upon which the decision of the State court was rested.

297; *Asher* v. *Texas*, 128 U. S. 129; *Blodgett* v. *Silberman*, 277 U. S. 1, 7; and see *Mooney* v. *Holohan*, 294 U. S. 103, 115.

(3)

THE APPEAL IS FROM A FINAL JUDGMENT OF THE HIGHEST COURT OF THE STATE OF GEORGIA.

The judgment directs that the prisoner be remanded to custody; it affirms the legality of his detention; it is final both in form and substance. The Supreme Court of Georgia is the highest court of the State.

(4)

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL.

(1) Whether a State statute may, without violating the Fourteenth Amendment, make criminal any attempt by persuasion or otherwise to induce others to combine together for the purpose of achieving fundamental changes in the economic, political or social structure of the country, provided only that the person making the attempt intends that forcible resistance to the authority of the State shall occur "at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce" is a substantial Federal question.

The statute, as construed by the highest court of the State, makes criminal any effort to induce others to combine in forcible resistance to the authority of the State, however remote the time when the suggested force is to be used, if the contemplated length of time is such that one might reasonably expect his conduct to have some persuasive power at the time of the occurrence. It is immaterial whether force is actually employed in the particular

case, whether there was intent or inducement that it should be employed immediately or in the near future or whether there was any genuine probability that it would be employed at all. This construction must be regarded as written into the statute by the authoritative hand of the State. (*Morehead* v. *New York ex rel. Tipaldo*, No. 838, October Term, 1935, 80 L. Ed. 921, 926; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 220). Such a statute is invalid under the criterion enunciated by this Court in *Schenck* v. *United States*, 249 U. S. 47 (1919), that to justify an abridgment of the freedom of speech guaranteed by the first amendment the words spoken or otherwise disseminated must be used "in such circumstances" and be "of such a nature as to present a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent" (249 U. S. 47, 52). See also *Debs* v. *United States*, 249 U. S. 211. That freedom of speech and of assembly are comprehended within the "liberty" guaranteed by the due process clause of the Fourteenth Amendment is settled. (*Gitlow* v. *New York*, 268 U. S. 652, 666; *Whitney* v. *California*, 274 U. S. 357, 362, 371, 373; *Fiske* v. *Kansas*, 274 U. S. 380, 382; *Near* v. *Minnesota*, 283 U. S. 697, 707; *Stromberg* v. *California*, 283 U. S. 359, 368; *Hamilton* v. *Regents of University of California*, 293 U. S. 245; *Grosjean* v. *American Press Company*, 297 U. S. 233.) Appellant's contention that the "clear and present danger" test of the *Schenck* case marks the boundary of permissible abridgment of that freedom by State statute "has color of support in words uttered from this bench and uttered with intense conviction" (Mr. Justice Cardozo, dissenting, *Herndon* v. *Georgia*, 295 U. S. 446). There is no authoritative determination in cases arising under either the Fifth or the Fourteenth Amendment that this criterion has been altered or abandoned (cf.

Abrams v. *United States*, 250 U. S. 616; *Pierce* v. *United States*, 252 U. S. 239; *Schaefer* v. *United States*, 251 U. S. 466). In two cases a minority of this Court has affirmed its applicability to the guaranty of the Fourteenth Amendment while the majority of the Court has sustained the validity of the State statute on the ground that the passage of the act making criminal the advocacy of a particular revolutionary doctrine, explicitly set forth, or the formation of an association for the purpose of such advocacy, evidenced a legislative finding, not unreasonable in character, that advocacy of the proscribed doctrine involved great danger of causing the kind of conduct which the State may endeavor to prevent (*Gitlow* v. *New York*, *supra*, *Whitney* v. *California*, *supra*). But section 56 of the Georgia Penal Code is plainly not of the same character as the statutes sustained in the *Gitlow* and *Whitney* cases, as to which a reasonable legislative finding of danger was held an adequate substitute for the judicial finding envisaged by the *Schenck* case. No specific doctrine is explicitly stated and condemned by the statute; what is punished is any attempt—by persuasion or otherwise—to achieve a specific result—the inducement of others to combine at some indefinite future time in forcible resistance to the authority of the State. The present statute is not one "condemning utterances identified by a description of their meaning" (Mr. Justice Cardozo, dissenting, *Herndon* v. *Georgia*, 295 U. S. 450) but rather one like that involved in *Schenck* v. *United States*, *supra*, which this Court said in *Gitlow* v. *New York*, *supra*, pp. 670-671, "merely prohibits certain acts involving the damager of substantive evil, without any reference to language itself." Where an attempt is made to apply the provisions of such a statute "to language used by the defendant for the purpose of bringing about the prohibited results" (*Gitlow* v. *New York*, *supra*, pp. 670-

671), this Court said in the *Gitlow* case that "it must necessarily be found as an original question, without any previous determination by the legislature, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection" (*Gitlow* v. *New York, supra,* p. 671). The inquiry which this Court thus held to be essential is precisely the one which the statute as construed by the highest court of the State renders immaterial.

Moreover, even were the present statute regarded as having the same character as those involved in the *Gitlow* and *Whitney* cases, it cannot be considered as supported by a legislative finding such as that which this Court treated as adequate in those cases. The New York statute was passed in 1902 after the assassination of President McKinley by an anarchist and was applied during a period of post-war emergency when the New York legislature was considering further means to suppress what it regarded as widespread seditious activity (see Revolutionary Radicalism, Report of the Joint Legislative Committee of the State of New York Investigating Seditious Activity, 1920). The California statute was passed shortly before its application at a time when according to its preamble "large numbers of persons are going from place to place in this State advocating, teaching and practicing criminal syndicalism" (see concurring opinion of Mr. Justice Brandeis, *Whitney* v. *California, supra,* p. 378). But the Georgia statute under which appellant was convicted was passed in 1866, an adaptation of a statute directed against the fomenting of insurrection among slaves which goes back to 1804 (see the Act of May 19, 1804, Clayton, Compilation of the Laws of Georgia 1800-1810, p. 178 No. 132; Georgia Penal Code (1817), Div. III, § 4). With one possible exception, section 56 apparently remained unused until shortly before

it was resurrected in the present case to prevent discharge of appellant from custody following the admonition of a court on a *habeas corpus* hearing that appellant would be discharged unless he were indicted. In these circumstances, it cannot be said that the statute finds support in a legislative finding that attempted persuasion to join the Communist Party or to induce others to support the program of that party (to which, of course, the statute does not refer) gives rise to present danger of acts constituting a substantive evil that the State may constitutionally prevent. Moreover, the decisions in the *Gitlow* and *Whitney* cases rest in effect upon the presumption of constitutionality, but this presumption is that the facts are such that the legislation is reasonable and it may be rebutted by showing that the facts are otherwise (*Borden Farm Products Co., Inc.* v. *Baldwin*, 293 U. S. 194, 209; *Pacific States Co.* v. *White*, 296 U. S. 176, 185). In the *Gitlow* and *Whitney* cases, the Court found nothing to indicate that the conditions at the time of the application of the statute differed essentially from those at the time of its enactment and the normal presumption was that they did not. But historical knowledge within the range of judicial notice suffices to establish such complete disparity between conditions in Georgia at the time of the passage and the time of the application of section 56 of the Penal Code to appellant that if any presumption of constitutionality arises in the instant case it is effectively rebutted. It cannot reasonably be believed that in Georgia "the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion" (see concurring opinion of Mr. Justice Brandeis, *Whitney* v. *California, supra*, p. 377).[4]

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[4] That the sovereignty of Georgia is secure is a matter of common knowledge; it has been openly conceded by

(2) A State may not, consistently with the due process clause of the Fourteenth Amendment, penalize the advocacy of political, social or economic change to be achieved by lawful means and a statute which is construed and applied so as to render such advocacy criminal violates the fourteenth amendment. *Fiske* v. *Kansas*, 274 U. S. 380. This Court has jurisdiction on appeal to determine whether a State statute as construed to apply to the facts of a particular case by the highest court of a State is in conflict with the Federal Constitution for the application of the statute "affirms its validity as so applied," *Fiske* v. *Kansas, supra*, pp. 385-386; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 288-289. "The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented" (*Fiske* v. *Kansas, supra*). As a necessary corollary this Court will in determining the nature of the situation to which the statute has been construed to apply consider whether there is any evidence to support the conclusions of fact of the State court (*Fiske* v. *Kansas, supra*) and that question is therefore Federal in nature.

Whether the statute as construed and applied in this case has the effect of penalizing the advocacy of political, social or economic change to be achieved by lawful means is a substantial Federal question. Examination of the evi-

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counsel for the appellee throughout this case. Appellant admitted that he had only five or six members of the Communist party in Atlanta (R. 104). In 1932 the Communist candidate for President of the United States polled 23 votes in the whole State of Georgia and in 1928 the Communist candidate polled a total of 64 votes in the entire State. In 1924 no votes were cast for the Communist candidate and in 1920 there was no candidate. Georgia's steady and almost unanimous adherence to the tenets of one of the major American political parties demonstrates its tenacity of political opinion.

dence in this case shows conclusively that the defendant did not advocate violence within the meaning of *Fiske* v. *Kansas, supra.* All the evidence at appellant's trial was contained in the portion of the record on his previous appeal to this Court which was appended to the petition for *habeas corpus* as Exhibit C, incorporated in the petition by reference and received in evidence at the hearing on the return to the writ. This evidence consisted of the testimony of three witnesses and certain documents, some of which related to the Communist Party. A part of these documents was in a box under appellant's arm at the time of his arrest; the remainder were found in his room when it was later searched without a warrant (R. 99[5]). The three State witnesses were Watson, the arresting officer (R. 97), Clonts, a clerk in the post office (R. 100) and Assistant Solicitor General Stephens (R. 102). Clonts' testimony concerned only the identity of appellant, a young Negro, as lessee of the post office box in the Federal Post Office Building at Atlanta, Georgia, which he was opening at the time of his arrest. Watson and Stephens identified the documents offered in evidence as taken from appellant's person or found in his room. Both testified that appellant after his arrest had stated that he was an organizer for the Communist Party and Stephens testified that appellant had described his duties as an organizer: "To call meeting, disseminate information regarding the party at these meetings; to distribute literature, to secure members for the meetings and generally to work up an organization of the Communist Party in Atlanta" (R. 104). Stephens further testified that appellant had stated that he held or

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[5] Record references are to record of trial which is Exhibit C in petition for *habeas corpus,* numbered in accordance with pagination of record prepared on the original appeal to this Court.

had attended two or three meetings and had "five or six actual members" of the Communist Party in Atlanta (R. 105).

Neither Watson nor Stephens testified to any further knowledge of appellant or his activities; both swore that they had not seen appellant before his arrest and had no personal knowledge of his previous life and work (R. 99, 107, 109, 110). Stephens testified that appellant stated that he was the author of one or two of the documents in evidence (Nos. 30 or 31, R. 183-6), both of which were characterized by the court below on appeal from the judgment of conviction as "more or less harmless" (178 Ga. 857).

The documents seized by the police officers and which make up the balance of the State's evidence, consist in part of literature published in the interests of the Communist Party, and one or more books of radical economic character which appellant apparently had for his own reading.

Appellant was shown to have distributed copies of two of the papers in evidence. These were the two described by the Supreme Court of Georgia as "more or less harmless." There was no evidence that the remaining documents were distributed by the appellant. His mere possession of the literature does not support the inferences that he was attempting to distribute it, that he was familiar with all its contents and that he was attempting to persuade others to do all the things which were stated to be desirable in the documents; in some cases, indeed, only single copies were found in defendant's room. Even were these inferences permissible however there is nothing in the literature to sustain appellant's conviction. Thirteen of the documents were mentioned in the opinion of the Supreme Court of Georgia (178 Ga. 832) and may therefore be assumed to have influenced its judgment particularly.

Nine of these thirteen were membership books in the Communist Party (3-11, R. 146, 151), which contained a general description of the Communist Party, its aims and purposes. Three of the thirteen documents, "The Communist Position on the Negro Question" (Document 13, R. 156-7), "An Appeal to the Southern Young Workers" (Document 16, R. 169-170) and "Party Organizer" (Document 17, R. 170) were Communistic publications containing party propaganda. The other document relied on by the Georgia court, a book entitled "Communism and Christianism" (Document 15, R. 161-171) was not shown to have any connection with the Communist Party and was apparently mere personal reading matter. The documents which had some connection with the Communist Party contain no exhortations or incitations to violence immediate or remote.[6]

The documents expound and advocate the general aims of the Communist Party such as unity of all workers and organization to improve the conditions of the working class. They advocate certain specific measures such as political and economic rights for Negroes equal to those of whites, "self-determination for the Black Belt," punishment of lynchers, disbanding of military units, abolition of child labor, minimum wages, maximum working hours, strikes and boycotts. Occasionally there is an unexpounded use of the word "revolution" or "revolutionary" in describing the cooperative activities of the Party members. Nowhere is it indicated that revolution by violence is implied; on the contrary the context shows that the words were used as a description of change of a far-reaching type, as for example, in the phrase "industrial revolution." The documents did not advocate forcible resistance to the authority

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[6] The only use of the word is in "Communism and Christianism" in a context which shows it was not a word of incitation.

of the State. Accordingly, whether regarded as expounding the character of the Communist Party or as having been distributed by appellant they provided no warrant for the conclusion that he was advocating violence. In no respect did any of the literature go any further than the preamble to the constitution of the Industrial Workers of the World which this Court held in *Fiske* v. *Kansas, supra,* was within the domain of constitutional protection.

That the Georgia Supreme Court was not unaware of the weakness of the evidence offered in an attempt to show advocacy of violence is evidenced by the reliance it placed upon the proposition that the changes urged in the literature could not be accomplished without probable violent opposition, from which it was inferred that in advocating such changes appellant must have intended that violence should be used in their support (178 Ga. 86). The inference is logically questionable but even if valid it lends no support to the judgment. Possible violent reaction does not justify suppression of the expression of views which may evoke it (Cf. *Near* v. *Minnesota,* 283 U. S. 697, 722; *New York Staats Zeitung* v. *Nolan,* 89 N. J. Eq. 387, 388). If suppression can be justified on these grounds the constitutional protection is nullified at the point at which its importance begins.

At the trial appellant made an unsworn statement to the court in which he stated his belief that the real reason for his arrest was that he had organized an appeal by the unemployed to the city authorities administering relief. In the course of this statement he expressed his judgment that "the system we are living under is on the verge of collapse and that the unemployed have a right to demand food and shelter from the government." Even were it permissible to sustain his conviction on his unsworn statement of his beliefs, men "judging in calmness" could find nothing incendiary in a pessimism then so current or in a belief

in the obligation of government to support the needy so generally recognized. There was nothing in the statement indicating that he had urged others to resist the authority of the State by force or that he thought the time propitious for any sort of drastic political action (R. 118-128). Thus all the evidence at the trial established only that Herndon had admitted extrajudicially being an organizer for the Communist Party and that he had in his possession the documents which have been described above. The evidence was insufficient to establish that either appellant individually or as a member of the Communist Party had advocated violence which would deny him the constitutional protection which this Court enforced in *Fiske* v. *Kansas*. Accordingly, the statute is invalid as construed to apply to his conduct and the judgment of conviction and sentence of from 18 to 20 years in the penitentiary cannot stand. *Fiske* v. *Kansas*, *supra*.

(3) Whether the statute as construed and applied by the Supreme Court of Georgia is too vague and indefinite to provide a standard of guilt which is sufficiently ascertainable to satisfy the due process clause of the Fourteenth Amendment is a substantial Federal question. The statute was held invalid on this ground by the Georgia Superior Court which sustained the writ of *habeas corpus* (R. 20). The construction of the statute to require that the insurrection which need neither have occurred nor been imminent should be intended to "happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce" constitutes "an unequivocal rejection of the test of clear and present danger, yet a denial also of responsibility without boundaries in time • • • a standard wholly novel, the expectancy of life to be ascribed to the persuasive power of an idea" (Mr. Justice Cardozo,

dissenting, *Herndon* v. *Georgia*, 295 U. S. 454). It is not necessary under this test that one should in fact believe that his speech or effort will actually cause violent insurrection at any time. What is necessary is that he intend such violence within a time which a jury estimates to be a reasonable measure of the persuasive power of his ideas. The uncertainty in making such an estimate may be relatively unimportant in cases where the incitement is such that the hiatus between utterance and action is very short. In such cases, common experience of men's responses may furnish some guide. But where that is not the case, where the trajectory of an idea calling for action by large numbers of people may extend into the indefinite future, as the court below seems to have conceded to be true in the instant case, neither juries nor trained experts can have the knowledge necessary to measure its length. In *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 223, this Court observed that while it "is easy to put simple cases" the case before the Court was complex and "the law must be judged by it." The period during which persuasion may remain effective, during which men will march to the measure of another man's thought, is in a case like the present not only completely outside the experience of ordinary men; it is entirely within the realm of the unknown and the unknowable. Accordingly, a jury, possibly influenced by the passion and prejudice engendered by the views of an unpopular minority, is free to speculate about a question which it cannot answer and, upon the product of its speculation to award judgment of death. A statute the application of which is conditioned upon the answer to such an inquiry provides a standard of guilt which is completely indefinite and therefore is invalid under the due process clause.[7] *United States* v. *L. Cohen Grocery*

[7] The absence from the statute of reasonably ascertainable standards of guilt is emphasized by its elastic quality

Company, 255 U. S. 81; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Connally* v. *General Construction Company*, 269 U. S. 385; *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 243; *Standard Chemicals & Metals Corp.* v. *Waugh Chemical Corp.*, 231 N. Y. 51.

It is especially important that a statute which limits the free exercise of constitutional rights on penalty of death, in the discretion of the jury, should provide a reasonably definite rule of permissible conduct so that the citizen may know where the line is drawn and so that, being fairly on the right side of the line, he may not be deemed to have crossed it when inflamed passions rule men's decisions. If constitutional rights are to be preserved, the traps which are designed to catch those who unlawfully abuse them must at least be marked and not hidden in a form of words so obscure that no one can tell where they may lie, unless prepared to risk his life in the adventure. A statute limiting freedom of speech by a rule so indefinite is, by reason of its indefiniteness alone, an unreasonable limitation. This Court has recently said (in language equally applicable to the right of free speech): "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250. Such indefinite limitations are as destructive of constitutional rights as the "taxes on knowledge" abhorred

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in the hands of the Georgia courts. In appellant's case, it has been interpreted in three different and inconsistent ways by the Georgia courts, in addition to having been held invalid for uncertainty by one of them. None of the courts by which the statute has been considered has explained the meaning of the construction discussed above, beyond stating that the evidence sustains appellant's conviction thereunder. (See the opinion on petition for rehearing, 179 Ga. 600.)

by the colonists and the Louisiana statute condemned by this Court in the *Grosjean* case. This contention likewise involves a substantial Federal question.

Conclusion.

WHEREFORE, it is respectfully submitted that the appellant in the above-entitled cause comes within the proper jurisdiction of this Court.

WHITNEY NORTH SEYMOUR,
Attorney for Appellant.

HERBERT T. WECHSLER,
W. A. SUTHERLAND,
WALTER GELLHORN,
Of Counsel.

APPENDIX A.

Opinion of the Superior Court of Fulton County.

FULTON SUPERIOR COURT.

No. 141.

ANGELO HERNDON

vs.

J. I. LOWRY, Sheriff.

Habeas Corpus.

At the trial of the writ above stated, testimony and documents hereinafter referred to were tendered in evidence, objections made to the admissibility, and decision thereon reserved.

1. Applicant presented testimony identifying records before the Supreme Court of the United States in the case of Herndon versus State of Georgia.

2. Applicant tendered portions of records to which reference is above made.

3. Respondent tendered motion to quash indictment No. 37812, on which Herndon was tried and convicted, as made in this Court at his trial by a jury.

Held, objection overruled.

Applicant submits contentions that the law under which he was convicted is, as construed and applied in his case, unconstitutional, and that his detention thereunder is illegal, void and of no effect.

Held and adjudicated: That the applicant's contention that this law in question as construed and applied in his case is in conflict with the fourteenth amendment of the Constitution of the United States, in that it is too vague and indefinite to provide a sufficiently ascertainable standard of guilt; and that it is also in conflict with Article 1, section 1, paragraph 3, of the Constitution of the State of

Georgia, for the same reason, and that his conviction and sentence are unconstitutional, illegal, void and of no effect, be and the same is hereby sustained.

Contentions of applicant other than that above stated are not sustained.

ORDERED that the applicant be, and he is hereby, remanded to the custody of the respondent for twenty (20) days, such being the period allowed by law in which exceptions and appeal to the higher court may be taken by respondent to this order and judgment; and if such exceptions and appeal shall be taken then and until the final disposition of the case by the higher courts. Provided, however, that at any time applicant may be released of custody upon giving bail with good and sufficient surety acceptable to the sheriff of this county in the sum of Eight Thousand ($8,000.00) Dollars, conditioned upon applicant appearing and abiding the ultimate judgment and sentence of the Court if this order and judgment should be set aside.

And provided further, that if there shall be no exceptions to this order and judgment, and no appeal taken to the higher court, Applicant shall, at the expiration of the period aforesaid, be immediately released and discharged to respondent's custody in so far as he is held and restrained of his liberty under the conviction and sentence referred to herein.

(Signed) HUGH M. DORSEY,
Judge, Superior Court, Fulton Co.

December 7, 1935.

APPENDIX B.

Opinion of the Supreme Court of Georgia.

No. 11216. No. 11226.

SUPREME COURT OF GEORGIA.

LOWRY, *Sheriff*,

v.

HERNDON, *et vice versa*.

Decided June 13, 1936.

By the Court:

ATKINSON, *Justice*:

1. It is declared by statute: "Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection." Code of 1933, Sec. 26-902. In Herndon *v.* State, 178 Ga. 832, 174 S. E. 597, as explained on motion for rehearing in Herndon *v.* State, 179 Ga. 597, 598, 600, 176 S. E. 620, 621, the statute was construed: "It is immaterial whether the authority of the State was in danger of being subverted or that an insurrection actually occurred or was impending. • • • Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce." Held:

(a) Neither as expressed, nor as it was construed by this court, is the above statute void, as violative of the

fourteenth amendment of the Federal constitution (Code 1933, Sec. 1-815) for the alleged reasons (1) that it "denies and unduly restricts freedom of speech and of assembly;" (2) that "it is too vague and indefinite to provide a sufficiently ascertainable standard of guilt."

(b) Neither is the statute so construed and applied void as violative of the provisions of article 1, section 1, paragraph 3 of the constitution of the State of Georgia (Sec. 2-103) which provides: "No person shall be deprived of life, liberty, or property, except by due process of law," for the same above alleged reasons.

(c) Neither is the statute so construed and applied void as violative of the provisions of article 1, section 1, paragraph 15 of the constitution of the State, (Sec. 2-115) "No law shall ever be passed to curtail, or restrain the liberty of speech, or of the press; any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

(d) Neither is the statute as so construed and applied void as violative of the provisions of article 1, section 1, paragraph 24, of the constitution of the State (Sec. 2-124): "The people have the right to assemble peaceably for their common good, and to apply to those vested with the powers of government for redress of grievances, by petition or remonstrance."

The foregoing provisions of the constitution do not guarantee freedom of speech or the right of assembly in the perpetration of a crime.

2. After conviction of attempting to incite insurrection under the foregoing statute, and affirmance of the final judgment on writ of error to this court, and detention by the sheriff, the court erred in habeas corpus proceedings based on alleged unconstitutionality of the statute in holding the statute violative of the fourteenth amendment to the constitution of the United States (Code 1933, Sec. 1-815) and also of article 1, section 1, paragraph 3, of the constitution of the State (Sec. 2-103), in that relatively to both provisions of the State and Federal constitutions, the stat-

ute is "too vague, and indefinite to provide a sufficiently ascertainable standard of guilt."

3. The court did not err in refusing to hold the statute void as violative of the several provisions of the State and Federal constitutions on the several other grounds of attack urged against them as specifically stated in the first division, to which the cross bill of exceptions relates.

4. Under the pleadings and the evidence, which embraced the record on the trial that resulted in the conviction, the court erred in the habeas corpus proceeding in refusing to remand the prisoner to the custody of the officers.

Judgment reversed on the main bill of exceptions. Affirmed on the cross bill. All the Justices concur, except Russell, C. J., not participating.

Beck, P. J., concurs in the judgment.

APPENDIX C.

Opinion of the Supreme Court Denying Petition for Rehearing Following Affirmance of Judgment of Conviction. (179 Ga. 597.)

On Motion for Rehearing[1].

No. 9871.

September 28, 1934.

"Bell, *J.*:

Angelo Herndon was convicted of the offense of an attempt to incite an insurrection as defined in the Penal Code, § 56, and was given a sentence in accordance with section

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[1]The original opinion of the Supreme Court of Georgia, 178 Ga. 832, is not included in this statement because of its length. A copy of the opinion is included in the record of this court in Herndon *v.* The State, No. 665, October Term, 1934.

57. His motion for a new trial was overruled, and the judgment was affirmed by this court in a decision reported in 178 Ga. 832. No attack upon the constitutionality of the statute under which he was convicted was made in the court below, and none was attempted in this court prior to the decision referred to and the judgment based thereon. But, during the same term in which the judgment of affirmance was rendered and before the remittitur was forwarded to the clerk of the trial court, the defendant (plaintiff in error) filed a motion for a rehearing, suggesting some constitutional considerations, and being in its material parts as follows:

'Upon the trial of this case in the court below, the trial judge charged the jury (R. 195): "• • • That advocacy, however reprehensible morally, is not sufficient to convict the defendant where there is no evidence to indicate that the advocacy would be acted upon immediately. In order to convict the defendant, gentlemen, it must appear clearly by the evidence that immediate serious violence against the State of Georgia was to be expected or advocated." And also (R. 195) "that an attempt to commit an act which is, in fact, a crime, is not complete unless the alleged crime is dangerously near completion." Thus, as the trial judge construed the statute in question, it does not make criminal *every* attempt, by persuasion or otherwise, to induce others to join in combined resistance to the authority of the State, but only *such* attempts as are intended to bring about such resistance immediately or as are likely under all the circumstances to bring about such resistance immediately. The jury having returned a verdict of guilty, the plaintiff in error moved for a new trial on the ground that the verdict was contrary to law and the evidence (R. 16), and, his motion for a new trial having been denied, he duly excepted (R. 2). In construing the statute for the purpose of determining whether the evidence was sufficient to support the verdict, this court said in its opinion (174 S. E. 609): "It is immaterial whether the authority of the State was in danger of being subverted or that an insurrection actually occurred or was impending." And this court also said (174 S. E. 610): "Force must have been contemplated, but,

as said above, the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but it would be sufficient that he intended it to happen at any time as a result of his influence, by those whom he sought to incite. It was the intention of this law to arrest at its incipiency any effort to overthrow the State government, where it takes the form of an actual attempt to incite others to insurrection." Thus, as this court construed the statute, every attempt to persuade others to join in combined resistance to the authority of the State is criminal, provided only that the person making the attempt intended forcible resistance to occur at some time, however remote, as the result of his persuasion, however unlikely that his attempt would succeed. It is obvious that this court's construction of the statute is radically different from that of the trial judge. That means that the statute as applied by the trial court was a very different statute from the statute as applied by this court.

'Under the trial judge's construction, the evidence was insufficient to support the verdict of guilty unless it was proved either that the plaintiff in error attempted to persuade others to engage in *immediate* forcible resistance to the authority of the State or that the plaintiff in error should have foreseen under the circumstances that forcible resistance was likely to result *immediately*. Under this court's construction of the statute, the evidence was sufficient to support the verdict if it was proved that the plaintiff in error intended that forcible resistance to the State's authority should occur at any time whatever as the result of his persuasion, however unlikely that result under the circumstances. The rigid and narrow construction of the statute by this court necessarily raises the question whether the statute as construed and applied *by this court* to the facts of this case was repugnant to the due-process clause of the fourteenth amendment to the Federal constitution. This question was obviously material to a decision of the appeal of the plaintiff in error because if the statute as con-

strued by this court is unconstitutional the judgment of guilty rendered by the court below could not be lawfully affirmed. Moreover, no procedural obstacle is present to prevent consideration and determination of the constitutionality of the statute in question as construed and applied *by this court*. That question originated in this court, and the plaintiff in error was not required to anticipate, nor could he have anticipated, while the case was in the trial court, that this court would construe and apply the statute differently and even more strictly than it had been construed and applied in the trial court. Neither by an exception to the trial judge's charge, on the ground that the statute as construed by the trial judge was unconstitutional, nor by any conceivable assignment of error could the plaintiff in error have raised in the trial court the question of the constitutionality of the statute as it was subsequently construed and applied by this court. That question was therefore not only material to a decision of the appeal of the plaintiff in error but it is properly before this court, since it originated here and is now called to the attention of this court by the plaintiff in error at the first opportunity for so doing. The plaintiff in error respectfully submits that under the decisions of the Supreme Court of the United States in Schenck *v.* U. S., 249 U. S. 47, 52, Fiske *v.* Kansas, 274 U. S. 380, and Stromberg *v.* California, 283 U. S. 359, the statute as construed and applied by this court is repugnant to the due-process clause of the fourteenth amendment. This constitutional question was first presented by the decision of this court and should be considered by it before making a final determination of the appeal of the plaintiff in error. The plaintiff in error respectfully submits that this court should grant a rehearing of the appeal so that the court may now consider and decide the question whether the statute as construed and applied by it is constitutional.'

1. The language used by this court should be considered with the usual reasonable implications. The phrase 'at any time', as criticized in the motion for rehearing, was not intended to mean at any time in the indefinite future, or at any possible later time, however remote. An activity now

could hardly be expected to be the direct producing cause of an insurrection after the lapse of a great period of time, and it was not the purpose of this court to suggest that as to the mental requisite any such intent would be a sufficient ingredient of an attempt to incite an insurrection. On the contrary the phrase 'at any time' was necessarily intended, and should have been understood, to mean within a reasonable time; that is, within such time as one's persuasion or other adopted means might reasonably be expected to be directly operative in causing an insurrection. Accordingly, the statements by this court as quoted in the motion for rehearing are to be accepted in the following sense: Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce. This statement, considerate with what was said in the original decision, represents the view of this court as to the proper construction of the statute under consideration; and under the statute as thus interpreted, we say, as before, that the evidence was sufficient to authorize the conviction. In view of what has been said above, it would seem that all contentions made in the motion for rehearing should necessarily fail, based as they are, upon an erroneous construction of our decision.

2. But to treat the motion as urged to the same extent under the decision as properly interpreted, it is a mere attempt to draw into question the constitutionality of the statute under which the defendant was convicted, where no such question was raised and passed upon in the trial court. Under repeated rulings by this court, a constitutional question can not be so presented. In Brown *v.* State, 114 Ga. 60 (2) (39 S. E. 873), it was said: 'This court will never pass upon the constitutionality of an act of the

General Assembly unless it clearly appears in the record that the point was directly and properly made in the court below and distinctly passed on by the trial judge.' See also Griggs *v.* State, 130 Ga. 16 (60 S. E. 103); Conyers *v.* Luther Williams Banking Co., 162 Ga. 350 (133 S. E. 862), and cit. In Loftin *v.* Southern Security Co., 162 Ga. 730(3) (134 S. E. 760), this court held as follows: 'Where it is sought to invoke a ruling by the Supreme Court on a constitutional question, the question must have been raised in the trial court and a ruling made thereon and the case brought to the Supreme Court for review.' In Dunaway *v.* Gore, 164 Ga. 219, 230 (138 S. E. 213), the following statement was made: 'Indeed it may be said that under the provision of our constitution, art. 6, sec. 2, par. 5 (Code, § 6502), which provides that the Supreme Court "shall be a court alone for the correction of errors," this court would in no event have jurisdiction to consider the merits of any question which is either intentionally or unintentionally omitted in the trial court. It is upon errors alleged by the complaining party to have been committed in the court below that this court must confine itself.' The provision of the State constitution as referred to in that case declares further, that 'The Supreme Court • • • shall be a court alone for the trial and correction of errors of law from the superior courts and the city courts of Atlanta and Savannah, and such other like courts as have been or may hereafter be established in other cities.' The principles ruled in the foregoing decisions can not be avoided by the circumstances referred to in the motion for rehearing. Regardless of the construction placed upon this statute either by the trial court or by this court, the defendant could have presented to the court below the construction which he deemed to be the proper one and in connection therewith could have attacked the statute upon any chosen constitutional ground. Cf. Hutchings *v.* Roquemore, 164 Ga. 637 (2) (139 S. E. 216).

In the brief it is stated that under the construction of the statute as adopted by this court, it is unconstitutional for the additional reason that it 'at once becomes so indefinite and uncertain that a conviction under it necessarily is a

denial of due process.' What has been said will apply also to the contention thus made. Furthermore, in West *v.* Standard Insurance Co., 176 Ga. 54 (166 S. E. 761), it was said: 'The constitutionality of a statute can not be raised for the first time in the brief of counsel filed in the Supreme Court.' See also Houston *v.* Thomas, 168 Ga. 67, 72 (146 S. E. 908). Accordingly, no question as to the constitutionality of § 56 is presented, and none is decided. The situation here is different from that involved in Hollman *v.* State, 175 Ga. 232 (165 S. E. 11), where this court held unconstitutional an act relating to applications for certiorari to review decisions and judgments of the Court of Appeals. The question there decided was one with which a trial court never could have been concerned.

The conclusion reached above is necessarily confined to the power and jurisdiction of this court, and is not contrary to such decisions as the following, which relate to the power and jurisdiction of the United States Supreme Court. Grannis *v.* Ordean, 234 U. S. 385, 392 (34 Sup. Ct. 779, 58 L. Ed. 1363); Saunders *v.* Shaw, 244 U. S. 317 (37 Sup. Ct. 638); Missouri ex rel. Mo. Ins. Co. *v.* Gehner, 281 U. S. 313 (50 Sup. Ct. 326); Brinkerhoff-Faris Co. *v.* Hill, 281 U. S. 673 (50 Sup. Ct. 451); American Surety Co. *v.* Baldwin, 287 U. S. 156 (53 S. E. 98). There is no merit in the motion for rehearing.

The foregoing has been prepared as the decision of this court in accordance with the views of the majority. The writer concurs in all that is said in the first division, and agrees also that the motion for rehearing should be denied. He does not, however, deem it necessary to commit himself either way at this time upon the correctness, under the particular facts of this case, of the reasons given above for the refusal to decide the constitutional question referred to in the motion for rehearing. In the opinion of the writer, the same conclusion may be reached upon a different basis, as to which certain observations will now be made. In the following discussion, however, he will speak for himself alone, and the views expressed will constitute no part of the decision, nor be taken as representing the opinion of any of the other Justices.

In order to raise a constitutional question, it is necessary, among other things, that the particular provision of the constitution alleged to have been violated by the statute shall be clearly designated. Griggs *v.* State, *supra;* Spielberger *v.* Hall, 159 Ga. 511 (2) (126 S. E. 391); Inlow *v.* State, 168 Ga. 377 (147 S. E. 881). And it must also be stated wherein that provision of the constitution is violated. Pace *v.* Goodson, 127 Ga. 211 (56 S. E. 363); Curtis *v.* Helen, 171 Ga. 256 (2c) (155 S. E. 202); Jordan *v.* State, 172 Ga. 857 (159 S. E. 235).

The due-process clause of the fourteenth amendment relates to life, liberty, and property, and there is more than one kind of liberty. The term may include, but is not limited to freedom of speech. Stromberg *v.* California, 283 U. S. 359 (3) (51 Sup. Ct. 532). The motion fails to state whether it is this or some other right or liberty of which the movant claims to have been deprived by the statute under consideration, and it is only by a study of the decisions cited therein and by statements in the accompanying brief that one is able to discern that it is liberty of speech which the statute is deemed to unwarrantably abridge. Obviously, therefore, the motion does not make a sufficiently definite attack upon the constitutionality of this statute, under the settled rule in this State.

But even to consider on its merits the question thus suggested, it is clear that the statute does not violate the due-process clause of the fourteenth amendment as related to liberty of speech. Any such contention would appear to be conclusively answered by the decisions of the Supreme Court of the United States in Gitlow *v.* New York, 268 U. S. 652 (45 Sup. Ct. 625); Whitney *v.* California, 174 U. S. 357 (47 Sup. Ct. 641). In the case last cited Mr. Justice Brandeis filed a special concurrence in which he was joined by Mr. Justice Holmes. Even in that opinion it was said that the right of free speech is not absolute and is subject to restriction 'if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral.' And in the same opinion it was further said, 'That the necessity which is essential to a valid restriction does not exist unless speech

would produce, *or is intended to produce,* a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled' (Italics ours.) In connection with this statement the author cited the case of Schenck *v.* United States, 249 U. S. 47, 52 (39 Sup. Ct. 247).

Under the statement made in the foregoing opinion by the court as to the sense and meaning of the original decision in the present case, the statute does not fail for want of sufficient certainty. All men subject to its penalties may well know what acts it is their duty to avoid. United States *v.* Brewer, 139 U. S. 278 (11 Sup. Ct. 538, 35 L. Ed. 190). See again the decision of Whitney *v.* California, *supra.*

Motion for rehearing denied. All the Justices concur, except

Russell, C. J. Not having participated in the original opinion delivered by the court, I decline to participate upon the motion for rehearing."

Filed in office, September 11, 1936. K. C. Bleckley, C. S. C. Ga.

(8327-C)

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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1936.

Nos. 474 and 475.

ANGELO HERNDON,

Appellant,

vs.

J. I. LOWRY, Sheriff of Fulton County.

ANGELO HERNDON,

Appellant,

vs.

J. I. LOWRY, Sheriff of Fulton County.

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

BRIEF FOR THE APPELLANT.

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Supreme Court of the United States

OCTOBER TERM, 1936.

Nos. 474 and 475.

ANGELO HERNDON,

Appellant,

vs.

J. I. LOWRY, Sheriff of Fulton County.

ANGELO HERNDON,

Appellant,

vs.

J. I. LOWRY, Sheriff of Fulton County.

APPEALS FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

BRIEF FOR THE APPELLANT.

Opinions Below.

The opinion of the Superior Court of Fulton County on the petition for *habeas corpus* (R., 89) has not been officially reported. The opinion of the Supreme Court of Georgia (R., 100) is reported in 182 Ga. 582. The original

opinion of the Supreme Court of Georgia, on appeal from the judgment of conviction, is reported in 178 Ga. 832 and its opinion upon the denial of a petition for rehearing is reported in 179 Ga. 597. No opinion was rendered by the original Trial Court. The opinion of this Court dismissing for want of jurisdiction the appeal from the judgment affirming the conviction is reported in 295 U. S. 441. The dissenting opinion of Mr. Justice Cardozo (in which Mr. Justice Brandeis and Mr. Justice Stone concurred) appears in 295 U. S. 446. This Court's denial of a petition for rehearing is recorded in 296 U. S. 661.

Jurisdiction.

The judgment of the Court below was entered June 13, 1936. The petition for the allowance of an appeal was presented to Hon. Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia on September 10, 1936, and the appeal was allowed by him on that day. This Court noted probable jurisdiction on November 23, 1936. Jurisdiction to review the judgment of the court below upon appeal is founded upon Section 237(a) of the Judicial Code as amended by the Acts of February 13, 1925, January 31 and April 26, 1928. The validity of a Statute of the State of Georgia, as construed and applied in this case, was drawn into question and the decision was in favor of its validity.

Statute Involved.

The statute, the validity of which as construed and applied to appellant was drawn into question by proceedings on *habeas corpus*, is Section 56 of the Penal Code of Georgia (Acts, 1866, p. 152), which provides:

> "Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful

authority of the State shall constitute an attempt to incite insurrection.'"[1]

The statute was construed by the Supreme Court of Georgia in its opinion upon the petition for rehearing of the judgment affirming appellant's conviction[2] in the following manner:

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[1]The punishment for an attempt to incite insurrection is provided by Section 57 of the Penal Code (Acts, 1866, pp. 152, 153, as amended by Acts, 1871, pp. 19, 20) as follows:

> "Any person convicted of the offense of insurrection, or an attempt to incite insurrection, shall be punished with death; or, if the jury recommend to mercy, confinement in the penitentiary for not less than five nor more than twenty years."

Insurrection is defined in Section 55 of the Penal Code (Acts, 1866, pp. 152, 153) as follows:

> "Insurrection shall consist in any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested or intended to be manifested by acts of violence."

[2]In its original opinion affirming the judgment of conviction the statute was construed somewhat differently, as follows: "* * * Force must have been contemplated but, as said above, the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. * * * Nor, would it be necessary to guilt, that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but it would be sufficient that he intended it to happen at any time, as a result of his influence, by those whom he sought to incite * * *" (178 Ga. 855). The construction of the statute by the trial court differed radically from both constructions on appeal. The jury was charged "* * * That advocacy, however reprehensible morally, is not sufficient to convict the defendant where there is no evidence to indicate that the advocacy would be acted upon immediately. In order to convict the defendant, gentlemen, it must appear clearly by the evidence that immediate serious violence against the State of Georgia was to be expected or advocated" (See 179 Ga. 597).

"Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce" (179 Ga. 600).

In holding that appellant had violated the statute and affirming his conviction thereunder (178 Ga. 832, 179 Ga. 597) the Supreme Court of Georgia construed the statute to apply to the situation presented by the facts of this case.

Questions Presented.

1. Whether Section 56 of the Penal Code of Georgia, as construed and applied by the Supreme Court of Georgia, unreasonably restricts appellant's freedom of speech and of assembly and is, therefore, invalid under the due process clause of the Fourteenth Amendment.

2. Whether Section 56 of the Penal Code of Georgia, as construed and applied by the Supreme Court of Georgia, prescribes a standard of guilt which is so vague and indefinite that it is not susceptible of reasonable ascertainment and application and is, therefore, invalid under the due process clause of the Fourteenth Amendment.

3. Whether the Supreme Court of Georgia erred in sustaining the validity of the Statute as construed and applied, reversing the judgment of the Superior Court of Fulton

County in so far as it sustained appellant's contentions and ordered his release, and affirming the judgment of the Superior Court in so far as it overruled appellant's contentions.

Statement.

Appellant, a young Negro, petitioned for *habeas corpus* in the Superior Court of Fulton County, Georgia, his petition alleging that he was unlawfully detained and held in custody by the appellee, J. I. Lowry, as Sheriff of the County, the sole claim of authority under which he was held being a judgment of the Superior Court of Fulton County reciting his conviction under Section 56 of the Georgia Penal Code of "attempting to incite insurrection" and sentencing him to confinement in the Fulton County jail until his removal therefrom for imprisonment at hard labor in the Georgia penitentiary or some other place designated by the Governor for not less than eighteen nor more than twenty years (R., 1-5). Attached to the petition were (1) a copy of the judgment of conviction (Exh. A, R., 6); (2) a copy of the indictment (Exh. B, R., 6-10)[1];

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[1]The indictment (R., 6-10) charged that on July 16, 1932 appellant "did make an attempt to incite insurrection and did make an attempt to induce others to join in combined resistance to the lawful authority of the State of Georgia with intent to the denial of the lawful authority of the State . . . . and with intent to defeat and overthrow the lawful authority of the State . . . . by open force and by violent means and by unlawful acts, said attempt to incite insurrection intended to be manifested by accused by unlawful acts and intended by accused to be accomplished by acts of violence * * *". The offense was alleged, in effect, to have been committed in the following manner:

(1) By calling and attending public assemblies "in the homes of various persons . . . . unknown" and making speeches to "vari-

(*Footnote continued on next page.*)

(3) a portion of the record in this Court, on appellant's appeal from the judgment of the Supreme Court of Georgia affirming his conviction, containing a full statement of the evidence upon which the verdict, judgment and other proceedings at the trial were based (Exh. C, R., 11-86). As the evidence is fully stated in Point I of this brief, a sum-

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(*Footnote continued from previous page.*)

ous persons . . . . unknown," with the purpose of organizing "a group and combination of persons white and colored, under the name and style of the Communist Party of America for the purpose of uniting, combining and conspiring to incite riots, to embarrass and impede the orderly processes of the courts and for the purpose of offering and making combined opposition and resistance to the lawful authority of the State of Georgia and for the purpose of overthrowing and defeating by force and violence the lawfully constituted authority of the State * * *";

(2) By soliciting "certain persons . . . . unknown" to "become members of the Communist Party and the Young Communist League"—"to the intent and purpose of creating, offering, establishing and waging war against the lawfully constituted authority of the State of Georgia for the purpose of overthrowing the lawfully constituted authority of the State . . . . by acts of violence and by revolution and establishing . . . . a new government known as United Soviets Soviet Russia, sometimes called and known as "The Dictatorship of the Propertyless People' ";

(3) By introducing, circulating and aiding in the introduction and circulation of "certain booklets, papers and other writings with the intent and purpose of inciting insurrection, riot, conspiracy, uprising against the constituted authority of the State and for the purpose of establishing combined resistance to and against the lawful authority of the State * * *". The following publications were specifically mentioned: "The Life and Struggles of Negro Toilers" by George Padmore; "Party Organizer" issued by The Central Committee, Communist Party; "Communism and Christianism" by Wm. Montgomery Brown; the "Daily Worker" and "The Southern Worker".

mary statement at this point has been omitted for the sake of brevity.

The petition alleged that "there is nothing in the evidence upon which petitioner's conviction is based to show that there was a clear and present danger that violence or other unlawful acts would result from petitioner's action, or that petitioner advocated violence or other unlawful acts, or that violence or other unlawful acts would probably result from any of petitioner's action, or that whatever violence or other unlawful acts might result from any of petitioner's actions would be likely to occur in the immediate or foreseeable future or at any given time" (R., 2). The indictment upon which the petitioner was tried, the judgment of conviction and the sentence of imprisonment were all alleged to be void and the detention to be illegal and unconstitutional because of the unconstitutionality of Section 56 of the Georgia Penal Code. The petition asserted that the Statute is invalid on its face and as construed and applied to the facts of his case by the Supreme Court of Georgia, by reason of the fact that as written and as thus construed and applied it is in conflict with the Fourteenth Amendment to the Constitution of the United States in the following particulars: "(a) It denies and unduly restricts petitioner's freedom of speech and of assembly" and "(b) It is too vague and indefinite to provide a sufficiently ascertainable standard of guilt" (R., 3). The invalidity of the Statute as construed and applied was also claimed under various provisions of the State constitution which are not now material. Finally, the petitioner alleged that there had been no adjudication in his case by any court of the validity under the Constitutions of the United States and of the State of Georgia of the Statute under which he was convicted.

The writ issued. The appellee answered, demurred specially to the portion of the petition incorporating the evidence contained in the record on appeal and, in addition,

moved to strike the allegation with respect to such incorporation, as well as the exhibit itself (R., 86-87). At the final hearing upon the petition and answer the portion of the record above referred to was identified, conceded by appellee to be a correct statement of the evidence presented at the trial, and was received in evidence over his objection (R., 92). The only evidence offered by appellee was a copy of the appellant's motion before trial to quash the indictment, which was received. The Court denied appellee's motion to strike, overruled his special demurrer and objection to the admission of the trial record and held (1) "that the applicant's contention that this law in question as construed and applied in his case, is in conflict with the Fourteenth Amendment of the Constitution of the United States, in that it is too vague and indefinite to provide a sufficiently ascertainable standard of guilt; and that it is also in conflict with Article I, Section 1, Paragraph 3 of the Constitution of the State of Georgia for the same reason, and that his conviction and sentence are unconstitutional, illegal, void and of no effect, be, and the same is hereby sustained"; and that (2) "Contentions of applicant other than that above stated are not sustained" (R., 89-91). Appellant's ultimate release from custody was, therefore, ordered (R., 90-91).

Appellee appealed to the Supreme Court of Georgia assigning as error the rulings on his demurrer, motion and objection, and the decision that the Statute is invalid. As required by the Georgia practice to bring up for review the other grounds of invalidity urged in the petition and overruled by the Superior Court, appellant filed a cross-appeal assigning as error the decision adverse to those contentions. The two appeals were docketed as separate cases. In a single opinion the Supreme Court of Georgia reversed on appellee's appeal and affirmed on appellant's appeal. The opinion stated (a) "Neither as expressed, nor as it was construed by this Court" is the Statute void "as viola-

tive of the Fourteenth Amendment of the Federal Constitution" for the alleged reasons (1) that it "denies and unduly restricts freedom of speech and of assembly"; and (2) that "it is too vague and indefinite to provide a sufficiently ascertainable standard of guilt"; (b) "Neither is the Statute so construed and applied void as violative" of various provisions of the State Constitution invoked by appellant; (c) The decision of the Superior Court that the Statute is unconstitutional under the Fourteenth Amendment and the provisions of the State Constitution on the ground that it is "too vague and indefinite to provide a sufficiently ascertainable standard of guilt" was erroneous; (d) There was no error "in refusing to hold the Statute void as violative of the several provisions of the State and Federal Constitutions for the several other grounds of attack urged against them • • • to which the cross-bill of exceptions relates"; (e) "Under the pleadings and evidence, which embraced the record on the trial that resulted in the conviction, the Court erred in the *habeas corpus* proceeding in refusing to remand the prisoner to the custody of the officers" (R., 100-102).

Specification of Errors to Be Urged.

1. The court below erred in holding that Section 56 of the Penal Code of Georgia as construed and applied to appellant is not void by reason of the fact that as thus construed and applied it is in conflict with the due process clause of the Fourteenth Amendment in that it denies and unduly restricts freedom of speech and of assembly.

2. The Court below erred in holding that Section 56 of the Penal Code of Georgia as construed and applied by the Supreme Court of Georgia in appellant's case, is not void as violative of the appellant's rights under the due

process clause of the Fourteenth Amendment because it is too vague and indefinite to provide a sufficiently ascertainable standard of guilt.

3. The Court below erred in holding that Section 56 of the Penal Code of Georgia as construed and applied to appellant did not deprive appellant of his liberty without due process of law, in violation of the Fourteenth Amendment.

4. The Court below erred in reversing the judgment of the Superior Court of Fulton County in *habeas corpus* proceedings directing the eventual discharge of appellant from custody.

5. The Court below erred in directing that appellant be remanded to custody.

SUMMARY OF ARGUMENT.

I.

A.

The application of the statute to appellant is invalid because there is no evidence that appellant advocated or attempted to induce others to resort to force or to engage in acts of violence. The oral testimony failed to show any advocacy by appellant of the use of force or violence. The State failed to prove that appellant personally advocated the doctrine contained in the documentary evidence thought to be significant by the Court below. Minutes of meetings said to have been attended by appellant indicate that the meetings were called for lawful purposes. Even if the evidence is regarded as sufficient to charge appellant with advocacy of the doctrines set forth in the documentary evi-

dence, a calm analysis of its contents shows that it contained no advocacy of the use of force or violence. The view entertained by the Court below that violence must have been advocated because an attempt to put into effect the program indicated in the documentary evidence would result in violent opposition results in a denial of the constitutional protection at the point at which its importance begins. Appellant was not charged with obtaining members for a party with unlawful purposes. Furthermore, there was a total lack of evidence that in attempting to obtain members for the Communist Party appellant was advocating the use of force or violence or that the Party advocated such use. The evidence as a whole requires the conclusion that appellant was engaged in lawful political activities and no finding to the contrary can be sustained.

B.

Section 56 of the Georgia Penal Code as finally interpretated by the Court below on petition for rehearing of the judgment affirming appellant's conviction, does not require that the conduct which it proscribes involve the advocacy of immediate violence or a "clear and present danger" that it will result in violence or other unlawful acts. The statute thus contravenes the test laid down in *Schenck* v. *United States*, 249 U. S. 47. The continued vitality of that decision in stating a test to be applied to such statutes as the present has not been affected by later decisions of this Court. The requirement that conduct, to be punished validly, must involve the advocacy of immediate violence or give rise to a clear and present danger is necessary to protect and reconcile the undoubted right of the State to repel violent assault upon its sovereignty and the equally clear rights of freedom of speech and assembly guaranteed by the Fourteenth Amendment and essential to the preservation of the Republic.

The statute finds no support in the decisions in *Gitlow* v. *New York*, 268 U. S. 652, and *Whitney* v. *California*, 274 U. S. 357, because it does not condemn a specific doctrine identified by a description of its meaning and those decisions are therefore inapplicable. Even if the present statute is governed by those decisions, and the presumption of validity upon which they were based, it cannot be sustained. Examination of its back-ground and history shows that it was passed in substantially its present form in 1866; that its progenitors were aimed at conduct resulting in slave insurrections; that at the time of its passage in 1866, temporary conditions arising out of emancipation and other post-war disturbances gave concern to the legislature; that those conditions disappeared shortly after the war. There is no basis for concluding that the statute was aimed at conduct like appellant's and that conclusion is fortified by the failure to attempt an application of the statute until shortly before appellant was indicted. Conditions in Georgia, which the Court may judicially notice, negative the existence of any clear and present danger to the authority of the State arising out of activities connected with the organization of the Communist Party in Georgia. Under these circumstances, the statute cannot be regarded as a reasonable exercise of the State's police power to protect itself against violence.

C.

Even if the "clear and present danger" test applied in *Schenck* v. *United States*, *supra*, is not regarded as stating the limitation upon the right of the State to protect itself against abuse of the constitutional rights of free speech and assembly, nevertheless, the statute was invalid as applied to appellant since even if it be assumed that the evidence against appellant indicated advocacy of the ultimate use of force, its use was advocated only in the indefinite

future. No decision of this Court indicates that a State may constitutionally penalize utterances which may be deemed to import the use of force only at some indefinite time in the future.

II.

The statute as construed below eliminates the imminence or occurrence of force as an ingredient and requires only that defendant should intend that force should be used "at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action". The standard of liability embodied in the statute as thus construed is so indefinite that it contravenes the due process clause of the Fourteenth Amendment. Consideration of the matters upon which a jury would have to speculate to reach a conclusion about the period of time thus designated, demonstrates that they are left without any definite standard to apply. In such a case as the present (assuming, contrary to the fact, that appellant had intended that force should be used at some time), the jury would be required, among other things, to predict what action would be taken in the future by the leaders of the Communist Party, and how long it would take, under changing conditions, to organize a sufficient number of party members in Georgia and the other Southern states, to justify an attempt to put the party program into effect. To reach such a conclusion, they would be required to imagine different communities, both in Georgia and elsewhere, and the trajectory of the defendant's influence in such hypothetical communities. Common experience would supply no guide; the result of the jury's speculation would necessarily be arrived at through bias and prejudice and not through an appraisal of known facts in the light of common experience. Statutes containing standards so indefinite and failing to give fair warning of their scope violate the due process

clause. It is particularly important that a statute limiting free exercise of constitutional rights on penalty of death, should contain a fair warning of its scope, and the very indefiniteness of the present statute is in itself sufficient to condemn it as an unreasonable limitation upon the exercise of constitutional rights.

ARGUMENT.

POINT I.

Section 56 of the Georgia Penal Code, as construed and applied by the Supreme Court of Georgia, unreasonably restricts freedom of speech and of assembly and is, therefore, invalid under the due process clause of the Fourteenth Amendment.

A. *The application of the Statute is invalid because there is no evidence that appellant advocated or attempted to induce others to resort to force or to engage in acts of violence.*

Freedom of speech and of assembly are comprehended within the "liberty" guaranteed by the due process clause of the Fourteenth Amendment. *Gitlow* v. *New York*, 268 U. S. 652, 666; *Whitney* v. *California*, 274 U. S. 357, 362, 371, 373; *Fiske* v. *Kansas*, 274 U. S. 380, 382; *Near* v. *Minnesota*, 283 U. S. 697, 707; *Stromberg* v. *California*, 283 U. S. 359, 368; *Hamilton* v. *Regents*, 293 U. S. 245; *Grosjean* v. *American Press Company*, 297 U. S. 233; *DeJonge* v. *Oregon*, No. 123, October Term, 1936, decided January 4, 1937.

It is clear that a State may not, consistently with the due process clause of the Fourteenth Amendment, penalize the advocacy of political, social or economic change to be achieved by lawful means or the organization of a group

to further such advocacy. *Fiske* v. *Kansas, supra.* It is also clear that a State may not make the act of conducting, attending or speaking at a peaceful meeting, with a lawful purpose, a crime regardless of the purposes of the organization calling the meeting. *DeJonge* v. *Oregon, supra.* A statute which is construed and applied so as to render such behavior criminal violates the Fourteenth Amendment for the application of the Statute affirms its validity as so applied. *Fiske* v. *Kansas, supra,* pages 385, 386; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 288-289. This Court, in determining the nature of the situation to which the statute has been construed to apply, will accordingly consider whether there is any evidence to support the conclusions of fact of the State Court. *Fiske* v. *Kansas, supra.*

The evidence, upon the basis of which appellant was convicted and his conviction affirmed, consisted of the testimony of three witnesses and certain documents, some of which related to the Communist Party. The witnesses were Watson, the arresting officer (R., 11-13; 14-15), Clonts, a clerk in the postoffice[1] (R., 13-14) and Assistant Solicitor General Stephens (R., 15-23). According to Watson's testimony, some of the documents were found in a box under appellant's arm at the time of his arrest without a warrant while opening his mail box in the Federal postoffice Building in Atlanta[2]; and the remainder of the documents were

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[1]Clonts' testimony was limited to the identification of appellant as the lessee of the postoffice box which he was opening at the time of his arrest.

[2]Upon instructions of Assistant Solicitor General Stephens the police had been lying in wait for anyone who came to the box because a Commissioner had complained about receiving a "scurrilous" letter bearing the box number (R., 15). The alleged letter was never offered in evidence nor were its contents divulged. Two circular letters bearing the box number do, however, appear in the record. See documents 30 and 31, R., 83-86.

found in his room when, following the arrest, it was searched without a warrant (R., 11, 12).

Both Watson and Stephens testified that appellant, a young Negro, stated after his arrest and in response to their interrogation, that he had been sent to Atlanta as an "organizer" for the Communist Party (R., 12, 16-17). Stephens testified that appellant stated that he was paid $10.00 a week for his work as "organizer", that his duties were "to call meetings, educate or disseminate information regarding the Party at these meetings, to distribute literature, to secure members for the meetings and generally to work up an organization of the Communist Party in Atlanta" (R., 16), that he held or had attended two or three meetings and that "his organization • • • at that time had only five or six active workers" (R., 19) or "actual members" (R., 17), that the "documents and things" found in his room "were sent to him from the headquarters of the Communist Party in New York" (R., 12), that he was the author of one or two of the documents in evidence (Nos. 30 and 31, R., 83-86) which concerned unemployment relief and unemployment insurance, that he had distributed copies of these two documents which were characterized by the court below on appeal from the judgment of conviction as "of a more or less harmless character" and not "of any considerable importance within themselves" (178 Ga. 832, 856, 857). At the trial appellant made an unsworn statement to the Court (R., 25-33) in which he set forth, among other things, his belief as to the real reason for his arrest[1]. He referred to his work with the "Unemployment Committee" of Atlanta in organ-

[1]In the middle of June, 1932, relief agencies in the City Government of Atlanta had stopped furnishing relief (R., 25-26). The Unemployed Council of Atlanta, connected with the Unemployed Committees of the United States, of which appellant was a member, followed the policy of its affiliate in organizing the impecunious

(*Footnote continued on next page.*)

izing the Negroes and whites together for protest against conditions of unemployment and in support of adequate unemployment relief and unemployment insurance. Although in the course of his statement he expressed his judgment that "the system we are living under is on the verge of collapse" and that the unemployed have a right to demand food and shelter from the Government, nothing in the statement indicated that he had urged the unemployed or anyone else to resist the authority of the State or otherwise to resort to violence. Thus the relevant testimonial evidence consisted entirely of appellant's admissions. At the most, it permitted a finding that he had come to Atlanta in the interests of the Communist Party, had held a few meetings and had in his possession at the time of his arrest certain documents. The balance of the State's evidence consisted of the remaining documents seized by the police officers. Thirteen of these documents were mentioned in the opinion of the Supreme Court of Georgia (178 Ga. 832, 858-866) and may therefore be assumed to have influenced its judgment particularly. Nine of these thirteen were membership books in the Communist Party (Nos. 3-11, R., 47-55). The remaining four documents were "The Communist Position on the Negro Question" (No. 13, R., 60-69), "An Appeal to Southern Young Workers" (No. 16, R., 71-72), "Party Organizer" (No.

(*Footnote continued from previous page.*)

black and white workers so that they might make a united appeal for relief. The Unemployed Council issued leaflets (Documents 30 and 31, R., 83-86). This followed a statement of the County Commissioners that no one was starving in Atlanta. The meeting was held to show that the people who attended, both Negro and white, were half naked and starving (R., 27-28). Some of the white workers were permitted to come into the courthouse to see the County Commissioners, but the Negroes were excluded (R., 27). Although the County Commissioners had previously stated that they had no funds available for relief, they voted $6,000 for unemployment relief on the day after the demonstration (R., 28).

17, R., 72) and a book entitled "Communism and Christianism" (No. 15, R., 70-1, 73-4).

FIRST.—Whatever the character of these documents, there is no evidence in the record sufficient to sustain a finding that appellant had personally advocated forcible overthrow of the State Government or other acts of violence, for there was no evidence that appellant had distributed any of the documents except the two which were characterized as "more or less harmless" by the court below, as indeed they were. There is no evidence that appellant possessed any particular documents other than those referred to above in quantity sufficient for distribution[1]. There is no evidence that he had read any of these documents or showed them to anyone. It appears affirmatively that several of the documents were books which appellant apparently possessed for his own reading and obviously could not have undertaken to distribute[2].

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[1]While Watson referred in a portion of his testimony containing his identification of the documents as found in the box under appellant's arm or in his room to several "batches" of newspapers, in particular the "Daily Worker", the "Liberator" and "Young Worker" there was no indication that the various copies were all of the same issue rather than single copies of successive issues and in any event these documents were not relied upon by the Court below in sustaining the application of the statute and the conviction (R., 20-22).

[2]Due to an apparent error in preparing the original bill of exceptions, the introduction to the brief of documentary evidence states that all the documentary evidence referred to in the brief (R., 47) was in a box under appellant's arm at the time of his arrest. This is inconsistent with Watson's identifying testimony (R., 12, 20-3) which fails to distinguish specifically between all of the documents found in the box and in appellant's room. Moreover, it is apparent from a comparison of the testimony with the brief of documentary evidence and the motion for new trial, that it was physically impossible for all of the documents to have been contained in a small box under appellant's arm at the time of his arrest.

There was no testimony as to the character of the two or three meetings which appellant admitted holding, as to the nature of the discussions which occurred at those meetings or the extent of appellant's personal participation in them. Both Watson and Stephens denied that they had any knowledge of appellant or his activity, life and work other than that derived from his own statement to them (R., 13, 19, 20). They had never seen him prior to his arrest (R., 12, 15). The only evidence in the record which may be thought to bear upon the probable character of those meetings consists of the minutes of what purported to be a meeting of the "Section Committee" and two meetings of the "Foster and Ford Clubs" (Nos. 20, 21, 26, R., 75-76, 78-79). These minutes, in so far as they indicate anything, indicate that the meetings were lawful in nature and in purpose and that the parties attending the meetings were concerned about such matters as the relief of unemployment and the organization of the unemployed for articulate protest against the condition in which they found themselves.

Appellant's own unsworn statement at his trial, which was relied upon by the Court below to sustain the conviction (178 Ga. 832, 866-867) indicates nothing to the contrary. It refers to his activity in the work of the "Unemployed Committee" in organizing the protest of unemployed workers, which resulted in a grant of $6,000 for unemployment relief. There is no foundation for the inference which the Court below held permissible that in actively espousing "the cause of the unemployed" appellant was in fact engaged in advocating violence or insurrection. That appellant's activity with the unemployed was peaceful in character is further indicated by the "more or less harmless" circulars which appellant admitted distributing in support of the protest against the curtailment of relief. Nor is there any significance in appellant's statement at the trial that he believed "the system we are living under

is on the verge of collapse". There is not the slightest evidence that he or anyone else under his influence had advocated that the collapse which he thought impending should be utilized as an opportunity to overthrow the Government or forcibly resist its authority. So far as the statement throws any light on appellant's activity and state of mind, it seems to us more consistent to assume that he thought existing conditions favorable to peaceable organization of the unemployed. The pessimistic view of conditions existing at the time, which appellant voiced, was too frequently repeated by respected and peaceable citizens in this country and elsewhere to warrant the conclusion that expression of the view implies an intent to participate in or to urge others to participate in the overthrow of democratic institutions by force. Moreover, even if appellant's statement justified the inference which the Court below held to be permissible that he believed "the conditions were opportune for revolution", it does not justify the inference that he did anything to achieve that result. Appellant's statement to the jury thus contained nothing to support the judgment of conviction, although quite conceivably such a statement by a Negro, particularly one from another State who entertained unpopular views, may have inflamed the local prejudice of the white jury by reference to irrelevant matters such as the treatment of the unemployed and conditions in the local jail.

SECOND.—Even if it might be inferred from appellant's mere possession of literature relating to the Communist Party that he was familiar with all its contents, and that he was attempting to persuade others to do all the things which were stated to be desirable in the documents, the evidence is insufficient to permit the conclusion that appellant personally advocated forcible overthrow of the State Government or other acts of violence.

In appraising the documentary evidence it is, of course, necessary to read the documents as a whole and not to wrench words or phrases from their context and thus achieve a false emphasis unjustified by their setting. This principle, to be applied in considering this documentary matter, is the familiar one applied in criminal and civil libel actions, in slander actions and prosecutions for obscenity, which requires writings and utterances to be construed as a whole. See *United States* v. *One Book Entitled Ulysses*, 72 F. (2d) 705 (C. C. A. 2nd); *United States* v. *Dennett*, 39 F. (2d) 564 (C. C. A. 2nd); *Dupont Engineering Co.* v. *Nashville Banner Publishing Co.*, 13 F. (2d) 186, 189 (D. C., M. D., Tenn.); *Commercial Pub. Co.* v. *Smith*, 149 Fed. 704, 706 (C. C. A. 6th); *Halsey* v. *New York Society*, 234 N. Y. 1, 4; *Klaw* v. *New York Press Co., Ltd.*, 137 App. Div. 686, 688; *Daniel* v. *Moncure*, 58 Mont. 193, 200; *Flaks* v. *Clark*, 143 Md. 377, 382; *Stevens* v. *Storke*, 191 Cal. 329, 334; *Moore* v. *Booth*, 216 Mich. 653, 656; see also the dissenting opinion in *Schaefer* v. *United States*, 251 U. S. 466, 483. Furthermore, proper judgment upon the true meaning of the documents requires recognition of their generic relationship to American political tracts, which traditionally contain rhetoric and overstatement which the average reader naturally discounts and usually is intended to discount.

The "Extracts from the Statutes of the Communist Party of the U. S. A." contained in the membership books found in appellant's possession (R., 49-52), outline the form of the Party organization and contain references to the importance of Party regularity and discipline. They contain no advocacy of insurrection but only quite harmless description of the Party's structure. They also contain some slight exposition of the nature and ideals of the Party. In the course of this explanation, the word "revolutionary" appears. It is also used in several of the other documents which we shall discuss, and the court below

seemed to attach special significance to it (178 Ga. 864, 7). When it is considered in its setting it is perfectly plain that the word does not imply any advocacy of force or intent to overthrow the government forcibly. It is often used in describing the Marxist theory to distinguish the principles of Marxism from more traditional economic doctrine. The word occasionally appears as a part of the phrase "proletarian revolution". This implies a change in what the Party asserts, elsewhere in the documentary evidence, to be the present distribution of political power. There is nothing to indicate that the change could not occur peacefully. Economists and historians have long described the changes in the economic system of the world effected through scientific development and the general substitution of machines for handicraft as the "industrial revolution". The changes since March 4, 1933, have sometimes been described as the "Roosevelt Revolution" (see Lindley, *"The Roosevelt Revolution"*). Such phrases carry no implication that changes thus characterized were brought about through violence. Thus, the words "revolutionary" and "revolution" in the documentary evidence in this case, can only be considered as describing a new political or economic program, without any implication that its achievement will involve force. Such words are merely symbols of important change, and, in view of the political traditions of this country, imply, at most, a substantial shifting of economic and political power as a result of lawful activity.

The original opinion of the court below quotes from a booklet entitled "The Communist Position on the Negro Question" (R., 60-9). This booklet contains excerpts from a speech delivered in 1932 in nominating a candidate for Vice-President of the United States at a lawfully held convention of the Communist Party (R., 61-2). These excerpts must, of course, be read in the light of the traditional purpose and nature of nominating speeches at national con-

ventions. The speaker for the Party (who was not appellant) demanded confiscation of lands now owned by white landowners in the so-called "Black Belt". This and the following statements of party principles are couched in the familiar language of party platforms. The statement of a "demand" at a party convention is not a call to party members to take individual or collective illegal action. It is an appeal to voters for support. Certainly "confiscation" might occur through constitutional means and the use of the word does not imply the employment of violence. If words are to be used loosely, the Eighteenth Amendment or the recent legislation affecting the gold content of the dollar might be regarded as resulting in widespread confiscation, but that was accomplished without violence. The speaker further said that the Party proposed to change State boundaries and establish State unity for the "Black Belt". There is no suggestion that this was to be done through violence. It is clear that it could be done by constitutional amendment or possibly by compact among the States affected. A further "demand" is that the Negroes are to be given the right of self-determination in the territory, the right to set up their own government, and the right to separate, if they wish, from the United States. In view of the nature and setting of this "demand", it cannot be regarded as importing or advocating the use of violence. The phrase "right of self-determination" came into general currency through its use by President Wilson, and its use connotes orderly and peaceful decision in the territories affected through plebiscites or otherwise. Peaceful exercise of that right would result in setting up a government acceptable to those exercising the right of self-determination. While our history does not afford a case in point, even secession could be accomplished peacefully unless the opposition resorted to force and so precipitated a conflict. Certainly, that eventuality must be regarded as so remote that even if it should be deemed to import

the use of force, it cannot be taken seriously as a threat to the authority of the State of Georgia. Considered in their setting, it is quite clear that the remarks quoted in the statement did not constitute advocacy of the use of violence against lawful authority.

The court below also referred to another part of the same pamphlet containing "Resolutions of the Communist International on the Negro Question in the United States" (R., 63-7). This resolution contains the same general program set forth in the nominating speech referred to above. It purported to show that the international organization of the Communist Party took the same view of the Party program for the South that had been expressed at the Party convention. No significance is to be attached to the word "revolutionary" in this statement for reasons given above. The resolution contains the following statement: "Within the limits of this State (meaning a State comprising the Black Belt) there will of course remain a fairly significant white minority which must submit to the right of self-determination of the Negro majority. There is no other possible way of carrying out in a democratic manner the right of self-determination of the Negroes". There is no justification for an inference that the suggested dominance of the Negro majority over the white minority should be achieved through violence. The reference in the booklet to the fact that the change in the relation between Negroes and whites suggested, was the only possible way of carrying out the right of self-determination in a "democratic manner" shows that the emphasis is upon maintenance of democratic institutions and not upon their destruction.

The suggestion that Party members should "demand" that "no armed forces of American imperialism should remain on the territory of the Black Belt" is again a mere statement of a Party purpose consistent with the idea that its program could be carried into effect through lawful

means. The resolution further states: "Even if the situation does not yet warrant the raising of the question of uprising, one should not limit oneself at present to propaganda for the 'right to self-determination', but should organize mass actions, such as demonstrations, strikes, tax boycott movements, etc." We believe that this is the only statement in all of the documentary evidence from which any possible inference could be drawn that the Party program might eventually contemplate some use of force to carry it into effect. But this statement declares explicitly, not only that any actual violence is deferred, but that even the consideration of the question whether violence would ever be necessary, is premature. Where such doubts exist, and the way to peaceful action is clearly left open, it is not to be assumed that the doubts would be resolved in favor of the use of violence, and advocacy of that use by appellant, in defiance of the expressed wish of the leaders of the Party, cannot be inferred. The suggestion for mass action does not involve any forcible resistance to the authority of the State. All of the action mentioned could be carried out peacefully, and, considering the number of actual members in the State indicated by the election returns (*infra*, p. 43), even the mass action suggested would necessarily be long deferred. The resolution recognizes that "it is just possible for the Negro population of the Black Belt to win the right to self-determination during capitalism". This is a clear recognition that the demands of the Party may be achieved without any resort to force, and it negatives any possible inference that force is implied in the Party program. The conjunction of this statement with reference to "national rebellion" shows that the word "rebellion" is used in the same sense as the word "revolution" which we have discussed above, and that it does not imply the use of violence. Reference to the Party's "Bolshevik line on the Negro question" is obviously a mere characterization of the program previously stated, and adds nothing to the implications of that program.

The court below quotes from a book found in appellant's possession, entitled "Communism and Christianism" (R., 73-4). One copy of this book, which contained 247 pages, was found in appellant's room (R., 22). The book did not purport to be an official Communist publication. Furthermore, the excerpts from the book quoted by the court below (178 Ga. 865, R., 73) did not indicate that the author of the book considered that violence would be necessary to change the capitalist system. The excerpts state, in effect, that the working class must organize politically to acquire the powers of government. They indicate that a change in the political organism is necessary. The proposed change in the organism is expressed in figures taken from the activities of the husbandman, but the possible exaggeration in these figures does not change the fact that the author suggests that the changes be accomplished through political action. Many changes have been effected in the Constitution of the United States which might be described as an uprooting and replanting, if one chose to use those figurative terms. It is quite plain that the author felt that in some countries the change would not have to occur, as in Russia, through violence. The conviction can no more be sustained because the appellant had in his possession a book of this character, than if it were based upon his possession of a copy of the Encyclopedia Brittanica, which contains many descriptions of revolution and economic and political doctrine. It is not to be inferred that men advocate violence because they read, or because their reading includes modern equivalents of the radicalism of Thomas Paine.

The court below referred to a document entitled "An Appeal to Southern Young Workers" (R., 71). There is nothing in this document which incited to violence or which added anything to the documents which we have already discussed. Reference to "smashing" the National Guard, the C. M. T. C. and R. O. T. C. is, of course, not to be taken

literally. It is merely an expression in exaggerated language of a demand for the end of compulsory military training and of the maintenance of military establishments. It is part of the program of many established religious and charitable organizations. The appellant could not be properly penalized because the choice of words was inexact or even offensive. No one could reasonably suppose that the literature advocated a forcible collision with the armed forces of the State in an effort to remove them, because increase of membership and not suicide was the purpose of this Party literature. The court below considered that some of the statements necessarily imported the use of violence because in *Carr* v. *The State*, 176 Ga. 55, it had reached that conclusion in passing upon a demurrer to an indictment in which some of the phrases appearing in this literature were considered apart from their context. There was no justification for considering those phrases alone in the present case, and in their setting they do not bear that meaning.

The "Party Organizer", referred to by the court below, is not in the record (R., 72) and there is not the slightest basis for assuming that it contained any incitation to violence. Apparently only the summary appearing in the present record (R., 72) was before the court below. The court below states that "the literature fairly teems with such expressions as 'confiscation', 'revolution', 'rebellion' and 'violence' • • •" (178 Ga. 867). Careful examination of all the documentary evidence discloses no direct or indirect advocacy of violence. The only use of the word is in "Communism and Christianism", and the conviction certainly cannot be supported by anything appearing in that book, one copy of which was found in appellant's possession.

Examination of the additional documentary evidence in the record, which is not specifically mentioned in the opinion of the court below, fails to disclose any advocacy of

forcible resistance to the authority of the State of Georgia. Those documents specifically concerned with activity of groups in Georgia, reflect, as we have said, a picture of wholly peaceful organization of the unemployed. Taken as a whole, the documentary evidence can be regarded as stating only the general nature of the organization of the Communist Party and the program which it had at some earlier time favored, particularly for the Southern States. Even if appellant may be charged with the distribution of this literature or the advocacy of all the ideas contained in it, there is no justification for the conclusion that he was sounding the tocsin to violent revolt.

That the Georgia Supreme Court was not unaware of the weakness of the evidence offered in an attempt to show that appellant had advocated violence is evidenced by the reliance placed upon the proposition that the economic and political changes urged in the literature could not be accomplished without probable violent opposition, from which it was inferred that if appellant advocated such changes he must have intended that violence should be used in their support (178 Ga. 832, 867). The inference is logically questionable but even if valid it lends no support to the judgment. Possible violent reaction does not justify suppression of the expression of views which may evoke it (see *Near* v. *Minnesota*, 283 U. S. 697, 722; *New York Staats Zeitung* v. *Nolan*, 89 N. J. Eq. 387). If suppression can be justified on these grounds the constitutional protection is nullified at the point at which its importance begins. A restriction of the rights of freedom of speech and of assembly upon such grounds is a restriction of the right and not of the abuse of it (see *DeJonge* v. *Oregon*, decided January 4, 1937); the only constitutional method of dealing with the problem of probable violent opposition to the peaceful achievement of legitimate ends is to make such opposition criminal.

We believe that *Fiske* v. *Kansas*, 274 U. S. 380, requires the conclusion that the doctrine of the documents included in this record is within the domain of constitutional protection. The chief evidence offered against *Fiske* was the preamble to the constitution of the Industrial Workers of the World (set forth in Appendix A hereto). The preamble contained such expressions as: "There can be no peace so long as hunger and want are found among millions of the working people and the few, who make up the employing class, have all the good things of life". "Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system". "It is the historic mission of the working class to do away with capitalism. The army of production must be organized not only for the everyday struggle with capitalists, but also to carry on production when capitalism shall have been overthrown. By organizing industrially we are forming the structure of the new society within the shell of the old". Certainly there was at least as much room for implication that these doctrines required the use of violence as there is that the doctrines contained in the documentary evidence in this case did. Nevertheless, this Court declined to accept the conclusion of the Supreme Court of Kansas that advocacy of violence could be inferred and decided that the court and jury were not warranted in drawing an inference that the document advocated achievement of the program through forcible and unlawful means. We believe that the case governs the decision here upon this point, and that even if the documents are taken as evidence of doctrines advocated by the appellant in person or by the Communist Party, the conviction cannot be sustained.

Nor can the application of the Statute be sustained even if the evidence suffices to permit the inference that the appellant conducted meetings under the auspices of the

Communist Party or distributed literature published under its auspices, and this whatever the character of the Party may be. "The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held, but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the constitution protects". *DeJonge* v. *Oregon*, decided January 4, 1937. By the same token, the question is not as to the auspices under which literature distributed is published, but as to its contents; not as to the relations of the distributor, but as to whether the literature contains statements attributable to appellant which transcend the limits of constitutional protection.

THIRD.—The judgment cannot be sustained merely upon the ground that the evidence was sufficient to permit the conclusion that appellant came to Atlanta with the purpose of attempting to obtain members for the Communist Party, or, if the record is to be read as if it were the fact, upon the ground that he did obtain several members while he was there. The only evidence as to the character of the Communist Party consisted of the documents referred to above, some of which purported to contain statements of the Party's purposes. The record contains, however, no authentication of the official character of these documents, nor any showing that, if official, they represented present Party doctrine. Moreover, there was nothing in the documents, as we have shown above, to prove that the advocacy of forcible insurrection or other acts of violence were comprehended within the purposes of the Party. Accordingly, even if a State may, consistently with the due process clause of the Fourteenth Amendment, make it a crime to attempt to obtain members for an organization, which includes among its purposes the advocacy of force and violence in the achievement of its ends, appellant's conviction

cannot be sustained upon that ground. Moreover, he was neither indicted nor convicted merely upon the ground that he had attempted to obtain members for an organization, the purposes of which included the advocacy of violent insurrection. He was indicted and convicted and his conviction was sustained upon the theory that he personally had advocated such violence in Fulton County, Georgia. Something more would therefore be necessary in order to sustain the conviction than proof that the organization itself was unlawful in character. It would be necessary at least to show that in soliciting members appellant himself had subscribed to and advocated the unlawful purposes of the organization. There was, as we have stated above, no evidence sufficient to warrant the conclusion that he did so. In the light of the affirmative evidence as to the peaceful and lawful character of appellant's activities with the unemployment committee, we submit that it cannot be inferred that in attempting to obtain members for the Communist Party in Georgia, appellant personally advocated the use of force to obtain the party ends. Rather does the record require the conclusion that if appellant was engaged in endeavoring to increase the membership of the Communist Party, his purpose was to increase its political power to the end that the party program might be peacefully achieved.

B. *The Statute is invalid as construed and applied because it does not require either that there be advocacy of violence in the immediately near future or that the words used be of such a nature and that they be used in such circumstances as to create a "clear and present danger" of bringing the prohibited result to pass.*

As Section 56 of the Penal Code of Georgia was construed by the court below in its opinion upon rehearing (*supra*, p. 4) it makes criminal any effort to induce

others to combine in forcible resistance to the authority of the State, however remote the time when the suggested force is to be used, if the contemplated length of time is such "that he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce". It is immaterial whether force is actually employed in the particular case, whether there was intent or inducement that it should be employed immediately or in the near future or whether there was any genuine probability that it would be employed at all. The statute, as construed by the Court below, requires only that the defendant must have intended that those whom he attempted to persuade should resort to forcible resistance at a time "within which he might reasonably expect his influence to continue to be directly operative" in causing them to do so. Advocacy of forcible resistance is thus made criminal, however remote the time when force is to be used, if the defendant might reasonably expect his persuasion to have some part in its eventual occurrence. Not only is there no requirement of a clear and present danger to the authority of the State arising from a defendant's conduct or from the behavior which he advocates, but there is no necessity that there be any danger whatever.

As thus construed, the statute is clearly void under the test adopted by this Court in *Schenck* v. *United States*, 249 U. S. 47, to define the maximum limitation on freedom of speech permissible under the First Amendment. In that case the Court considered the validity of the Espionage Act of June 15, 1917 (40 Stat. 217) and of its application. Recognizing the power of Congress, through the exercise of its war powers, to prevent the substantive evils which might be brought about by unabridged freedom of speech or of the press during the progress of the War (and that limitations upon these liberties, necessary in time of war, might not be permissible in time of peace) the Court said (p. 52):

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

We contend that this test should be applied to the present statute under the Fourteenth Amendment, and that, if applied, the statute is necessarily invalid.

The right of the States to protect themselves against direct "incitements" to acts of violence and against conduct which creates grave danger that the government will be overthrown by force, is beyond question. *Near* v. *Minnesota, supra,* at page 716. But as this Court observed in *DeJonge* v. *Oregon,* decided January 4, 1937, "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means". The permissible scope of the exercise of the right of the State to prevent violence must be measured by the same tests which are applied in determining the validity of other statutes having legitimate ends, that is that "the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objects sought to be attained" (See *Nebbia* v. *New York,* 291 U. S. 502, 525; *Meyer* v. *Nebraska,* 262 U. S. 390, 400; *Whitney* v. *California, supra,* p. 371). Limitations upon the liberty of expression and of assembly have been recognized only in exceptional cases. *Near* v. *Minnesota, supra,* page 716. We maintain that in limiting the liberty

of speech and of assembly guaranteed by the Fourteenth Amendment beyond the point permitted by the test laid down in the *Schenck* case, the present statute is so unreasonable and arbitrary as to violate the Fourteenth Amendment. To brand as an "incitement" and condemn all advocacy of change which may be deemed to involve the use of force at some indefinite future time, is a means far better adapted to eliminating the formation of all assemblies for political discussion than to protecting the State against violence. So unnecessarily extensive an infringement of freedom is unreasonable as a means of deterring violence. Moreover, when the avoidance of violence is so exalted at the expense of freedom of expression, there is room for doubt whether the true end of the statute was not the suppression of freedom, which is not a permissible end.

The test laid down in the *Schenck* case reconciles the right of the State to protect itself against violence and the right of the individual to free political discussion and organization, and prevents improper abridgement of either right.[1] The test is a practicable and workable one; it is easy for courts and juries to apply. Other possible tests extending the right of the State beyond protecting itself against the advocacy or threat of immediate violence end in vague but dangerous trespasses upon liberties guaranteed by the Constitution.

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[1]The principle is analogous to that found in the common law of attempts to mark the point at which the danger of violence has been thought to outweigh the danger of trying "the thought of man". See *Commonwealth* v. *Peaslee*, 177 Mass. 267, 272; *Swift and Company* v. *United States*, 196 U. S. 375, 396; Beale, *Criminal Attempts*, 16 Harv. L. Rev. 491; Sayre, *Criminal Attempts*, 41 Harv. L. Rev. 821. If there is imperfection in the analogy, it springs from the inestimably greater danger to a democracy in curtailing the political freedom at which the present statute is directed than in the limitation of freedom involved in punishing an incipient attempt to commit a common crime.

The constitutional justification for the test of the *Schenck* case was well stated by Mr. Justice Brandeis in his concurring opinion (with Mr. Justice Holmes) in *Whitney* v. *California, supra,* at pages 376-377:

> "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. • • • In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.
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> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. *To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.* Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my

opinion, is the command of the Constitution." (Italics ours.)

Another statement of the reason for the "clear and present danger" rule is contained in the dissenting opinion of Mr. Justice Holmes in *Abrams* v. *United States*, 250 U. S. 616, 627-31:

> "• • • the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. • • • It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. • • • But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. • • • While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. • • • Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law . . . abridging the freedom of speech.'"

The continued vitality of the decision in the *Schenck* case, and the test there laid down, do not seem to us to have been substantially affected by subsequent decisions of this Court. Its authority was recognized in all of the later cases arising under the Espionage Act. See *Debs* v. *United States,* 249 U. S. 211; *Frohwerk* v. *United States,* 249 U. S. 204; *Abrams* v. *United States, supra; Schaefer* v. *United States,* 251 U. S. 466; *Pierce* v. *United States,* 252 U. S. 239, and cf. *Gilbert* v. *Minnesota,* 254 U. S. 325.

While in some of these cases the Court stated the rule to be applied, in appraising the evidence upon which conviction was based, in somewhat different words from those used in stating the test in the *Schenck* case, its continued authority was recognized and no attempt was made to limit the application of the test which it lays down. Dissents in some of these cases showed division upon the application of the Espionage Act to the facts in the particular cases, with possibly some apprehension on the part of the dissenting Justices that, in the application in the particular cases, the test of the *Schenck* case was not being applied as rigorously as it should be. But nothing explicitly said or held in those cases gives reason to doubt its continued recognition by the Court. Cases arising under the Espionage Act dealt with conduct occurring during the supreme emergency of war, and the Court recognized in the *Schenck* case as it has since (see *United States* v. *Macintosh,* 283 U. S. 605, 622; *Near* v. *Minnesota, supra,* at p. 716), that the exigencies of war may justify restrictions of freedom which would be intolerable in time of peace.

Gitlow v. *New York,* 268 U. S. 652, *supra,* and *Whitney* v. *California,* 274 U. S. 357, *supra,* somewhat limited the application of the test laid down in the *Schenck* case but otherwise they left it unimpaired. In the *Gitlow* case the Court considered the validity of the New York Criminal Anarchy Act (New York Laws of 1909, Ch. 88; New York Consolidated Laws, 1909, Ch. 40, originally passed in New

York Laws of 1902, Ch. 371) as construed and applied to the facts of that case. The statute defined with particularity the nature of the doctrine, advocacy of which was denounced. In the absence of any showing that the Court should not apply the familiar presumption of the existence of facts which would support the statute, the Court relied upon the legislative determination that advocacy of the defined doctrine involved grave danger to the safety of the State; accordingly, it sustained the validity of the statute and found that there was adequate evidence to justify its application. The Court pointed out the difference between a statute of that kind and one which merely prohibited certain acts involving the danger of substantive evil, saying (pp. 670-671):

> "It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an *original question,* without any previous determination by the legislative body, whether *the specific language used* involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection." (Italics ours.)

The Court for the first time declared that the test laid down in the *Schenck* case was intended to apply only to cases where the statute did not involve a previous valid determination by the legislative body as to the evil consequences of the advocacy of a doctrine. The minority (Mr

Justice Brandeis and Mr. Justice Holmes) did not concur in the distinction made by the majority as to the scope of the application of the "clear and present danger" test.

Similarly, in *Whitney* v. *California, supra*, the Court upheld the California Criminal Syndicalism Act (California Statutes, 1919, c. 188, p. 281), which meticulously defined criminal syndicalism and denounced the formation and participation in the work of organizations advocating criminal syndicalism. The legislature had expressly determined that the conduct at which the Act was aimed involved immediate danger to the public peace and security of the State. The Court also considered that there was sufficient evidence to justify application of the statute to Miss Whitney. Mr. Justice Brandeis and Mr. Justice Holmes concurred because there was some evidence which might have justified the trial court in finding the existence of a clear and present danger to the authority of the State arising from conspiracy by members of the International Workers of the World to "commit present serious crimes" and because objections urged in the Supreme Court had not been properly made below. The majority of the Court did not discuss the *Schenck* case, although by reference to the *Gitlow* case (p. 371) "and cases cited" it may perhaps be assumed that it reaffirmed its position in the *Gitlow* case with respect to the *Schenck* case.

But Section 56 of the Georgia Penal Code is plainly not of the same character as the statutes sustained in the *Gitlow* and *Whitney* cases, as to which a reasonable legislative finding of danger was held an adequate substitute for the judicial finding envisaged by the *Schenck* case. No specific doctrine is explicitly stated and condemned by the statute; what is punished is any attempt—by persuasion or otherwise—to achieve a specific result—the inducement of others to combine at some indefinite future time in forcible resistance to the authority of the State. The present statute is not one "condemning utterances identified by a

description of their meaning" (Mr. Justice Cardozo, dissenting, *Herndon* v. *Georgia*, 295 U. S. 441) but rather one like that involved in *Schenck* v. *United States, supra*, which this Court said in *Gitlow* v. *New York, supra*, pages 670-671, "merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself". Where an attempt is made to apply the provisions of such a statute "to language used by the defendant for the purpose of bringing about the prohibited results" (*Gitlow* v. *New York, supra*, pp. 670-671), this Court explicitly said in the *Gitlow* case that "it must necessarily be found as an original question, without any previous determination by the legislature, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection" (*Gitlow* v. *New York, supra*, p. 671). The inquiry which this Court thus held to be essential is precisely the one which the statute as construed by the highest court of the State renders immaterial.

Moreover, even were the present statute regarded as having the same character as those involved in the *Gitlow* and *Whitney* cases, it cannot be considered as supported by a legislative finding such as that which this Court treated as adequate in those cases. The New York statute was passed in 1902 after the assassination of President McKinley by an anarchist. It was applied in a period of post-war emergency, when feelings were aroused and revolutionary stirrings were felt throughout the world, to the advocacy of doctrine of the same general kind as that found by the Legislature to constitute a menace to the stability of the State (cf. the majority and dissenting opinions in *People* v. *Gitlow*, 234 N. Y. 132). At the time of Gitlow's indictment, the Legislature not only continued to recognize the existing danger of the substantive evil denounced in the statute, but it was earnestly considering further legis-

lation of the same general character.[1] The record contained no evidence rebutting the legislative finding; the finding was not rebutted by any facts within the range of judicial notice.

The California statute upheld in the *Whitney* case, *supra*, contained the following provision:

> "Sec. 4. Inasmuch as this Act concerns and is necessary to the immediate preservation of the public peace and safety, for the reason that at the present time large numbers of persons are going from place to place in this State advocating, teaching and practising criminal syndicalism, this Act shall take effect upon approval by the Governor." (California Statutes,

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[1]At about the same time, the New York Legislature, by concurrent resolutions, provided for a committee to investigate seditious activities. The preamble to the resolution contained the following:

> "WHEREAS, it is a matter of public knowledge that there is a large number of persons within the State of New York engaged in circulating propaganda calculated to set in motion forces to overthrow the government of this State and the United States, and
>
> WHEREAS, sufficient facts were adduced by the sub-committee of the Senate of the United States investigating this subject during the last session of Congress, to indicate the necessity of further inquiry and action, and
>
> WHEREAS, it is the duty of the Legislature of the State of New York to learn the whole truth regarding these seditious activities, and to pass, when such truth is ascertained, such legislation as may be necessary to protect the government of the State and to insure the maintenance of the rights of its citizens, * * *." (See *Revolutionary Radicalism*, The Report of the Joint Legislative Committee Investigating Seditious Activities, filed April 24, 1920, in the Senate of the State of New York, 4 vols.)

1919, Ch. 188, p. 282; see concurring opinion of Brandeis, J., in *Whitney* v. *California, supra*, p. 378.)

Thus, the decisions in the *Gitlow* and *Whitney* cases rest in effect upon the presumption of constitutionality, but this presumption is that the facts are such that the legislation is reasonable and it may be rebutted by showing that the facts are otherwise (*Borden Co.* v. *Baldwin*, 293 U. S. 194, 209; *Pacific States Co.* v. *White*, 296 U. S. 176, 185). In the *Gitlow* and *Whitney* cases, the Court found nothing to indicate that the conditions at the time of the application of the Statute differed essentially from those at the time of its enactment and the normal presumption was that they did not. But historical knowledge within the range of judicial notice suffices to establish such complete disparity between conditions in Georgia at the time of the passage of Section 56 of the Penal Code and at the time of its application to appellant that if any presumption of constitutionality arises in the instant case it is effectively rebutted.

Section 56 of the Penal Code of Georgia was passed in 1866, an adaptation of a statute directed against the fomenting of insurrection among slaves which goes back to 1804 (See the Act of May 19, 1804, Clayton, *Compilation of the Laws of Georgia*, 1800-1810, p. 178, No. 132; *Georgia Penal Code* [1817], Div. III, §4). With one possible exception, the statute was not invoked from 1866 until shortly before it was resurrected in the present case to prevent discharge of appellant from custody following the admonition of a court on a *habeas corpus* hearing that appellant would be discharged unless he were indicted (R., 29). We have traced in an appendix (Appendix B, pp. 57-73) the history and background of the present statute and its predecessors. That history shows that the predecessors of the statute were aimed at the government of a slave population and the statute itself was aimed at the almost anarchical conditions pre-

vailing in Georgia immediately following the War between the States and during the early years of reconstruction. The conditions at which it was aimed disappeared soon after the end of the war, and a quiet and peaceful relation has continued between the citizens of the State ever since. It cannot be considered that the Legislature determined in 1866 that activities such as those in which petitioner was engaged or doctrines such as those contained in the literature in the record presented a present danger of substantive evil which the State may prevent. The long period of disuse of the statute is in itself evidence of the disappearance of the conditions at which it was directed, and of the fact that no one regarded it as properly designed to fit others. Its continued presence on the statute books can give rise to no presumption in its favor which makes it applicable to an entirely new and unforeseen type of activity.

Facts of which the Court can take judicial notice show that the sovereignty of Georgia is secure. Indeed counsel for the appellee will undoubtedly concede here (as he has throughout the case) that the sovereignty of the State has never been threatened by appellant or the Communist Party. Appellant testified that there were only five or six actual members of the Communist Party in Atlanta. In 1932 the Communist candidate for President of the United States polled 23 votes in the whole State of Georgia, and in 1928 the Communist candidate polled a total of 64 votes in the entire State. In 1924 no votes were cast for the Communist candidate. In 1920 there was no Communist candidate. Certainly there was no clear and present danger to the authority of the State arising from petitioner's activities or those of others. The present record demonstrates that the doctrine advocated in the literature found in petitioner's possession did not give reasonable grounds to fear violence against the State, much less its violent overthrow. In these circumstances, it cannot reasonably be believed that, in Georgia, "the inci-

dence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion" (See concurring opinion of Mr. Justice Brandeis in *Whitney* v. *California, supra,* p. 377).

Accordingly, the present statute is invalid if measured by the test in *Schenck* v. *United States, supra,* which we contend is still the measure of the validity of statutes of the type involved in this case. It is also invalid, if measured by the test employed in the *Gitlow* and *Whitney* cases to determine the validity of statutes "condemning utterances identified by a description of their meaning".

C. *Assuming that the evidence permitted a finding that force was advocated, the application of the Statute is nevertheless invalid.*

Even if the evidence permitted a finding that force was advocated either by appellee personally or by the Communist Party, the application of the Statute is nevertheless invalid because there is no evidence of advocacy of the use of force in the reasonably near future. The merit of this contention is not dependent upon the validity of the argument immediately preceding with respect to the present vitality of the "clear and present danger" test enunciated in *Schenck* v. *United States, supra.* Should this Court hold that in condemning the advocacy of the use of force, a State is not required by the Constitution to limit its prohibition to the advocacy of immediate force, or to the advocacy of force under circumstances presenting a present danger that unlawful acts will result, it nevertheless does not follow that there are no limitations upon the extent of the permissible prohibition. It is reasonable to suppose, for example, that if a State attempted to make criminal the advocacy of forcible revolution a century or half a century or even a quarter of a century from now, the statute would be condemned on the ground that legislation designed to safeguard against violence must address

itself to the present and not to the utterly remote future.[1] Hence, it must at least be necessary to consider in each case whether the time at which it is advocated that force should be employed is within the reasonably near future. Unless it is, the advocacy presents no evil and therefore cannot be regarded as an abuse of the right of free speech with which the State may attempt to cope. There is nothing to the contrary either in *Gitlow* v. *New York* or in *Whitney* v. *California, supra.* In both cases the doctrine to which constitutional protection was denied was addressed to the present. Gitlow was found responsible for

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[1]For example, it would hardly be contended that a State could constitutionally punish the utterance of such views as are contained in the following remarks by Thomas Jefferson (in a letter from Paris to Colonel Smith, dated November 13, 1787):

> "Where did it [anarchy] ever exist, except in the single instance of Massachusetts? And can history produce an instance of rebellion so honorably conducted? I say nothing of its motives. They were founded in ignorance, not wickedness. God forbid we should ever be twenty years without such a rebellion. The people cannot be all, and always, well informed. The part which is wrong will be discontented, in proportion to the importance of the facts they misconceive. If they remain quiet under such misconceptions, it is a lethargy, the forerunner of death to the public liberty. We have had thirteen States independent for eleven years. There has been one rebellion. That comes to one rebellion in a century and a half, for each State. What country before, ever existed a century and a half without a rebellion? And what country can preserve its liberties, if its rulers are not warned from time to time, that this people preserve the spirit of resistance? Let them take arms. The remedy is to set them right as to facts, pardon and pacify them. What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time, with the blood of patriots and tyrants. It is its natural manure. * * *"

a "manifesto", an incitement to his contemporaries to prepare for violent revolt. Miss Whitney was held to have assisted in the organization of a party which had for its immediate program "carrying on a revolutionary class struggle by criminal methods" (See *DeJonge* v. *Oregon*, decided January 4, 1937).

Our previous discussion of the evidence in this case indicates, we believe, that there is no basis here for a finding that force was advocated in the reasonably near future, if it was advocated at all.[1] Accordingly, we contend that without regard to the contentions heretofore advanced, the application of the Statute is invalid under the Fourteenth Amendment.

POINT II.

Section 56 of the Georgia Penal Code as construed and applied by the Supreme Court of Georgia prescribes a standard of guilt which is so vague and indefinite that it is not susceptible of reasonable ascertainment and application and is therefore invalid under the due process clause of the Fourteenth Amendment.

After holding that the statute under attack does not require that forcible resistance to the authority of the State should follow immediately or at any given time, the court below in its opinion upon petition for rehearing interpreted the statute to apply:

> "• • • if he intended that it (an insurrection) should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce" (179 Ga. 600).

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[1]For an analysis of the remoteness of the possibility of action, if any, indicated by the evidence, see *infra*, pages 48-9, and the discussion of the documentary evidence, *supra*, pages 15-28.

The Superior Court held that the statute, thus construed and applied, embodies a standard of liability so indefinite that it contravenes the due process clause of the Fourteenth Amendment. We contend that its decision was correct.

The construction of the statute to require that the insurrection, which need neither have occurred nor have been imminent, should be "intended to happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce" constitutes "an unequivocal rejection of the test of clear and present danger, yet a denial also of responsibility without boundaries in time • • • a standard wholly novel, the expectancy of life to be ascribed to the persuasive power of an idea" (Mr. Justice Cardozo dissenting, *Herndon* v. *Georgia*, 295 U. S. 454).

A jury would be authorized to convict if it found that the defendant intended that forcible resistance to the State's authority should occur at some time (however remote), provided only that the jury felt that the defendant might reasonably have believed that his influence would at that time be directly operative in causing the forcible resistance. Proof that an alleged offender did, in fact, believe that his efforts would cause forcible resistance to the State's authority, would not be required; it would be enough if the jury could be persuaded that the defendant favored forcible resistance at some time and that he might reasonably have believed that his activities would have some influence in bringing it about.

The question whether a defendant might reasonably believe that his words would have some effect in causing an insurrection at some indefinite future time, is imponderable and unreal, as the present case shows. Assuming, for the present purpose that the appellant intended that, if necessary, forcible resistance to the authority of the State should be used at some undetermined time to put into effect the program of the Communist Party in Georgia, what

factors could be considered in estimating whether that indeterminate time would be within what appellant might reasonably believe to be the trajectory of his influence? The decision of a national or international political party whether and when to resort to violence, would presumably be dependent upon its leaders throughout the years to come; the resolution of its leaders would, in turn, be dependent, it may be assumed, upon the success of the Party organization in Georgia and elsewhere,[1] and the success of Party organization would be dependent upon changes in community opinion throughout the country that would be inconceivable without a complete transformation of the patterns of our national life. The question, in short, calls for

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[1]The program of the Communist Party set forth in some of the documentary evidence is a program for what it calls the "Black Belt". Reference to "The Communist Position on the Negro Question", No. 13 (R., 60), shows that the "Black Belt" includes parts of all of the Southern States. Thus action in any particular State would obviously depend upon the success of Party organization in all of the other States composing the "Black Belt". In order to prophesy how soon that organization would reach a point where the leaders of the Party would be likely to attempt to put the program into effect, it would be necessary not only for the jurors to imagine the community with which they were familiar in a different condition, but also to imagine fundamental changes in other communities, with the present conditions of which it is unlikely that they were familiar. Even in their own community, it would be necessary for them to speculate upon the length of time required to increase Party membership from the five or six members which appellant stated there were in Atlanta, and the apparently small number of Party members in the entire State to a number which the leaders of the Party would deem sufficient for effective action. Whether the Party leadership would wait until there were five hundred, a thousand, ten thousand or a hundred thousand members in Georgia (and a like number in other nearby States) would have to be determined, and there is no possible basis upon which it could be.

speculation upon the effect of unknown forces in a hypothetical community of the future; it cannot be answered by knowledge derived either from common experience or special study; it cannot be answered by the wisdom of the politically sagacious. If a jury is nevertheless permitted to answer it, bias and prejudice are the only standards it can employ.

The uncertainty in making such an estimate may be relatively unimportant in cases where the conduct advocated is such that the hiatus between utterance and action is very short. In such cases, common experience of men's responses may furnish some guide. But where that is not the case, where the trajectory of an idea calling for action by large numbers of people may extend into the indefinite future, as the court below seems to have conceded to be true in the instant case, neither juries nor trained experts can have the knowledge necessary to measure its length. In *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 223, this Court observed that while it "is easy to put simple cases" the case before the Court was complex and "the law must be judged by it" (Cf. *Stromberg* v. *California*, *supra*). The period during which persuasion may remain effective, during which men will march to the measure of another man's thought, is in a case like the present not only completely outside the experience of ordinary men; it is entirely within the realm of the unknown and the unknowable. A jury is nevertheless left free to speculate about a question which it cannot answer and, upon the product of its speculation to award judgment of death.

A statute which requires for its application the answer to so imperfect a question contains a standard of liability which necessarily renders it invalid under the due process clause of the Fourteenth Amendment. In *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, a case involving prosecution under an Act of Congress, this Court reaffirmed the rule that penal statutes cannot be sustained when

they fail to afford a definite standard for the guidance of the court and jury in ascertaining guilt or innocence. In declaring the statute unconstitutional this Court, in words applicable to the statute under consideration, said (pp. 89-91):

> "Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. • • •
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> That it results from the consideration which we have stated that the section before us was void for repugnancy to the Constitution is not open to question."

In *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, *supra*, this Court held invalid a Kentucky statute aimed at monopolistic price-fixing which made criminal the controlling of the price of goods so as to sell them above their real value, which was construed to mean market value under fair competition and under normal market conditions. The Court recognized that this statute required the jury to fix real value by reference to an imaginary world in which monopoly was eliminated and fair competition was assumed to exist. In holding the statute unconstitutional this Court said (p. 223):

> "The reason is not the general uncertainties of a jury trial but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts."

The difficulties of imagining a tobacco market in Kentucky under free competition seem to us less great than the difficulties of imagining the changes in the community life of Georgia and its neighboring States and the decisions which would be made by leaders of the Communist Party, preliminary to a prediction of what effect appellant might reasonably have expected his influence to have as future events unfolded. Due process denies clairvoyance so large a part.

Many other cases establish that statutes which, in effect, leave to courts or juries the power to declare an act a crime without containing, in themselves, any reasonable test for discovering whether the particular act was intended to be proscribed, are void. See *Connally* v. *General Construction Co.*, 269 U. S. 385; *Louisville & Nashville R. R.* v. *Railroad Commission of Tennessee*, 19 Fed. 679 (C. C., M. D., Tenn.); *Tozer* v. *United States*, 52 Fed. 917 (C. C., E. D., Mo.); *State* v. *Parker*, 183 Minn. 588; *Louisville & N. R. Co.* v. *Commonwealth*, 99 Ky. 132; *Ex parte Jackson*, 45 Ark. 158; *Czarra* v. *Board of Medical Supervisors*, 25 App. D. C. 443; Aigler, *Legislation in Vague or General Terms*, 21 Mich. L. Rev. 831, 843, 848, containing a list of State cases declaring State statutes void for uncertainty; cf. *Standard Chemicals & Metals Corp.* v. *Waugh Chemical Corp.*, 231 N. Y. 51.

In the last cited case, which involved the Lever Act, Mr. Justice Cardozo, writing for the New York Court of Appeals, said at pages 54-55:

> "The act, as the Supreme Court construes it, rejects all objective standards, all determinate or determinable criteria, the tests of practice or precedent or the market or the vicinage. Rejecting these, it sets the individual adrift upon the uncharted sea of subjective prejudice and favor. The *arbitrium boni viri*, unrestrained and undirected, becomes the test of right and wrong".

The risks incurred in violating the Lever Act were far less hazardous than those to which the appellant was subjected by the statute challenged here. The due process clause requires that criminal statutes shall be so framed that those to whom they are addressed may know what standard of conduct is intended to be required, so that men may guide their steps accordingly. See *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *United States* v. *Capital Traction Co.*, 34 App. D. C. 592; *Tozer* v. *United States*, 52 Fed. 917, *supra; Indefinite Criteria of Definiteness in Statutes*, 45 Harv. L. Rev. 160.

In *Connally* v. *General Construction Co.*, 269 U. S. 385, *supra*, this Court, through Mr. Justice Sutherland, said (p. 391):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The statute under which appellant was convicted created a crime unknown to the common law. Apparently,

it had been applied only twice since its enactment in 1866. The circumstances of appellant's arrest, his incarceration and the indication that he would be discharged if not indicted, suggest that even the prosecuting authorities did not feel that the statute clearly applied to his conduct. Its elasticity of meaning is further demonstrated by its treatment by the Georgia Courts in this case. It has been construed in three different and inconsistent ways—upon the trial, in the original opinion of the court below and in its opinion upon rehearing. It has been held invalid for uncertainty by one court. None of these courts sustaining its validity has expounded its meaning beyond stating that the evidence is sufficient to justify appellant's conviction under it. Thus, the courts charged with the duty of applying the law have themselves not been free from confusion in determining its meaning. The appellant, with no prior judicial declarations to guide him; with no well-settled common law meaning to inform him (cf. *Nash* v. *United States*, 229 U. S. 373); with no well-known technical or special meanings to attach to the words, to enable him to determine how the statute would be applied; with no standard, explicit or implicit, to assist him in planning his conduct, was compelled by the vagueness of the language used to put his life in jeopardy to discover whether or not his actions constituted the crime denounced. Surrender of his right to express his views was the price of safety. None could determine in advance whether such surrender in the circumstances of the present case was the mandate of the statute.

If the validity of the statute as construed by the Court below should be sustained by this Court, it is plain that no man in Georgia can safely seek to persuade others that a fundamental change in the structure of government should be brought about at a future time by the use of force if ultimately necessary, unless he is willing to gamble his life that the jury will guess that the undetermined time when he con-

templates that force may be necessary is not included within the period in which he "might reasonably expect his influence to continue to be directly operative". In a case where there is grave danger that freedom of expression will be suppressed by the threat of a statute so elastic in circumference, the language in *McBoyle* v. *United States*, 283 U. S. 25, 27, is peculiarly applicable:

> "• • • It is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."

It is especially important that a statute which limits the free exercise of constitutional rights on penalty of death, in the discretion of the jury, should provide a reasonably definite rule of permissible conduct so that the citizen may know where the line is drawn and so that, being fairly on the right side of the line, he may not be deemed to have crossed it when inflamed passions rule men's decisions. If constitutional rights are to be preserved, the traps which are designed to catch those who unlawfully abuse them must at least be marked and not concealed by sign-posts so obscurely worded that no one can tell where they may lie, unless prepared to risk his life in the adventure. A statute limiting freedom of speech by a rule as indefinite as that contained in the present law, is, by reason of its indefiniteness alone, an unreasonable limitation. This Court has recently said that upon the preservation of the rights of free speech, free press and free assembly "lies the security of the Republic, the very foundation of constitutional government" (*DeJonge* v. *Oregon*, decided January 4, 1937), and (in language equally applicable to the right of free speech) a "free press stands as one of the great interpreters between the government

and the people. To allow it to be fettered is to fetter ourselves'' (*Grosjean* v. *American Press Co.*, 297 U. S. 233, 250). A limitation of the right of free speech as indefinite as that imposed by the present statute is as destructive of constitutional rights as the ''taxes on knowledge'' abhorred by the colonists and the Louisiana statute condemned by this Court in the *Grosjean* case.

CONCLUSION.

Since the statute as construed and applied by the court below violates the due process clause of the Fourteenth Amendment, it is invalid and this Court should reverse the judgments below and direct the discharge of the appellant from custody and the cancellation of his bail.

Respectfully submitted,

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APPENDIX A.

The preamble to the constitution of the Industrial Workers of the World, as it appears at page 15 of the record in *Fiske* v. *Kansas*, 274 U. S. 380, is as follows:

> "The working class and the employing class have nothing in common. There can be no peace so long as hunger and want are found among millions of the working people and the few, who make up the employing class, have all the good things of life (fol. 27). Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system.
>
> We find that the centering of the management of industries into fewer and fewer hands makes the trade unions unable to cope with the ever growing power of the employing class. The trade unions foster a state of affairs which allows one set of workers to be pitted against another set of workers in the same industry, thereby helping defeat one another in wage wars. Moreover, the trade unions aid the employing class to mislead the workers into the belief that the working class have interests in common with their employers.
>
> These conditions can be changed and the interest of the working class upheld by an organization formed in such a way that all its members in any one industry, or in all industries, if necessary, cease work whenever a strike or lock-out is on in any department thereof, thus making an injury to one an injury to all.
>
> Instead of the conservative motto, 'A fair day's wage for a fair day's work', we must inscribe on our banner the revolutionary watchword, 'Abolition of the wage system'.
>
> It is the historic mission of the working class to do away with capitalism. The army of production must be organized not only for the everyday struggle with capitalists, but also to carry on production when capitalism shall have been overthrown. By organizing industrially we are forming the structure of the new society within the shell of the old."

APPENDIX B.

The predecessors of Section 56 of the Georgia Penal Code were aimed at activities designed to create rebellion among slaves; that was a danger of a particular kind, to be understood in the light of the history of Georgia and other States concerned by the same problem. The present statute, in substantially its present form, was passed in 1866 to deal with analogous dangers arising out of post-war conditions, and it now remains as a vestigial reminder of conditions long since banished.

Before the American Revolution, a general fear of slave insurrection was felt in practically all slave-holding colonies, especially during periods of warfare and political stress. Thus, in colonial New York, statutes were passed in 1708[1] and 1712[2] to prevent and punish slave insurrections and conspiracies. Slave scares in 1712[3] and 1741[4] led, in New York City, to the wholesale execution[5] of

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[1]I, *Colonial Laws of N. Y.*, 631 (1896 ed.). Justices of the Peace could impose death as a penalty after summary trial without a jury.

[2]I, *Col. Laws, N. Y.*, 761 (1896 ed.). Whipping was provided as the penalty for unlawful assembly of Negroes, for assaulting a white person, or for gaming. Summary trial and death was provided for murder, arson, rape, mayhem and insurrection. Whipping or fines were the penalties for whites who entertained or gave drink to Negroes.

[3]*New York City O. S. records*, 1712.

[4]*Judge Horsmanden's Account of Negro Conspiracy of* 1741-2, N. Y. 1744, 400 pages.

[5]More than fifty in New York City in 1712. In 1741 one hundred and twenty-five Negroes and two whites in New York City.

Negroes and of their white abettors, and involved the most cruel punishments.[6]

Georgia was established in 1732 by a body of philanthropists as a charitable enterprise for poor British subjects and as an English frontier.[7] Inconsistent as it may have been with the British colonial system,[8] slavery was forbidden.[9] Slavery would have been uncongenial to the system of small tenant farming which existed early in Georgia's history, and the presence of slaves would have been a source of weakness in a frontier community. Danger from Spain, from Indians and from lawless frontiersmen, made slave insurrections particularly menacing because of the ease "with which a hostile state might be able to encourage such uprisings."[10]

But pressure for slavery soon began to be exerted by the settlers themselves, and, in 1750, the Trustees passed an act allowing slaves in strictly limited numbers.[11] With the conflict between the desire for slaves and fear of the consequences of their presence, it was natural that colonial legislation should regulate slaves very carefully. In 1765, 1770 and 1773, various acts of the colonial legislature prescribed lashing as the punishment for unlawful assembly of slaves, and death without benefit of clergy for aiding runaway slaves and for the second offense of striking a white man.[12]

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[6]The stake, the rack, hanging in chains and quartering were among them.

[7]Osgood, *History of American Colonies in 18th Century*, III, 62.

[8]Osgood, *Ibid.*, III, 61 ff.

[9]*Georgia Colonial Records*, I, 31-62, 216. Acts of the Trustees.

[10]Osgood, *loc. cit.* III, 61, 62.

[11]Osgood, *loc. cit.* III, 65.

[12]*Ga. Recs.* XIX, Pt. I, pages 209-49. *Digest of Georgia Laws*, 1755-1800, Marbury & Crawford. Punishment of free Negroes by fine was provided for aiding a runaway.

Acceptance of slavery as a natural part of the economic system in Georgia followed the widespread growth of cotton cultivation after the first third of the nineteenth century.[13] Georgia forbade the slave trade by statute and in its constitution before 1800.[14] Not only slaves, but free Negroes as well, were closely regulated. Free Negroes, regarded as possible inciters of insurrection, were not encouraged to come into or stay in Georgia,[15] and no distinction was made between crimes committed by free Negroes and slaves.[16]

Against this background, the progenitor of the present insurrection law of Georgia was passed on May 19, 1804, to prevent the insurrection of slaves. Any incitement to insurrection of slaves was a felony punishable by death without benefit of clergy. The delivery and publication of

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[13]Coulter's *Short History of Georgia;* R. P. Brooks, *History of Georgia.*

[14]Statutes in 1793 and 1798. Coulter, *op. cit.*

[15]16 Ga. Hist. Quarterly 27 ff. (1932). *Free Negro Legislation in Georgia before the Civil War* contains an execellent resumé of all statutes against free Negroes. Free Negroes were forbidden to enter in 1818; those in the State were to be registered, and undesirable ones were banished. Ships carrying free Negroes were quarantined in 1829. In 1859 the penalty for free Negroes entering the State was slavery. Free Negroes were not to carry firearms, read, write, set type or practice medicine. In 1835 fining and whipping was the penalty imposed on free Negroes who aided slaves.

[16]Thus, in 1821, in *Capital Crimes Act* (Dec. 24, *Prince's Digest,* p. 799), death was the penalty for free Negroes or slaves committing rape, murder, insurrection or attempted insurrection. Courts could sentence free Negroes or slaves to death in their discretion for assault with murderous intent, mayhem and burglary accompanied by arson. Laws, 1829, page 172, adds malicious burning.

incendiary speeches were felonies punishable by banishment.[17]

Passage of the statute in 1804 was primarily dictated by the fear that free Negroes, lawless frontiersmen, avid land grabbers, Spanish invaders from Florida or hostile Indians would arouse the already too quickly-growing slave population to insurrection, and thus create a dangerous enemy behind the lines in time of foreign war or civil disturb-

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[17]Clayton's *Compilation of Laws of Georgia,* 1800-1810, page 178, #132. The relevant provisions were:

"Sec. 1. Be it enacted by the Senate and House of Representatives of the State of Georgia, in General Assembly met, and it is enacted by the authority of the same. That from and after the passing of this act, if any person or persons shall raise or attempt or endeavor to raise any insurrection of slaves, or shall counsel, advise, aid or abet any such insurrection, or shall excite, promote, instigate or stir up or endeavor to excite, promote, instigate, or stir up any such insurrection, every person or persons so offending, shall on conviction thereof, be adjudged guilty of felony, and shall suffer death without benefit of clergy.

Sec. 2. And be it further enacted, That if any person or persons, shall hold any discourse of conversation with any slave or slaves, and shall make or deliver, or cause, or procure to be made, or delivered to any slave or slaves, any discourse, speech, harangue or talk tending to excite such slave or slaves to sedition, tumult or disorder, or write, or print, or publish any such discourse, speech, harangue or talk; every person or persons so offending, shall on conviction thereof, be declared guilty of felony, and banished this state forever. And if any such person or persons shall at any time after being so convicted and banished, return to and be found at large within the limits of this state, he, or they so returning, shall suffer death without benefit of clergy."

ance.[18] Border warfare was going on between Georgians and North Carolinians over a disputed boundary.[19] Militia had to be ordered out seven months after enactment of this statute to prevent the landing of French Negro brigands.[20] But the immediate circumstance giving rise to the passage of this Act lay in the conduct of a Superior Court Judge of Eastern Georgia, who was removed from office for an attempt to "excite insurrection by holding converse with slaves, tending to inflame their minds, threatening to head such insurrection himself and destroy all the white people".[21]

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[18]Bitterness was felt at this time against the Federal Government over Indian affairs. Indian troubles broke down police control. Robbers were abroad in large numbers; mobs of hopeful land grabbers, vagabonds and ungovernable frontiersmen were vital dangers to the young State. Coulter, *History of Georgia*, 170-1, 284-5. And see footnotes 23 and 24 on the fear and danger of free Negroes. Florida was the settlement contiguous to Georgia and was governed by Spain until 1819.

[19]*Journal of House of Representatives of Georgia*, page 5, Regular Sessions, Nov. 1, 1804, Governor's message.

[20]*Journal of House of Representatives of Georgia*, page 48, Dec. 10, 1804.

[21]*Journal of House of Representatives of Georgia*, Extra Session, May 15, 1804, page 19. Charges exhibited against Jabez Bowen, Junior Judge of Superior Courts of Eastern District. He burned a court record; charged a grand jury urging principles (not stated) dangerous to lives and property tending to excite insurrection and involve the country in the horrors of domestic warfare; excited Negro insurrection; committed a grand jury to jail for censuring his charge; pointed a pistol at persons in the courtroom while on the bench. The insurrection statute was considered by the House on May 14 (p. 14), May 15 (pp. 18 and 19), May 17 (p. 22) and May 19. See further, *Senate Journal*, Extra Session, May 17 (p. 7), May 18, May 19 (p. 9), when the Act was passed and delivered to the Governor.

The insurrection section appears in the Penal Code of 1817 in a slightly modified form. The offense was no longer denominated as a felony but as a crime against the State and the People.[22] The unsettled character of contiguous territory and the frequent outbreaks of Indian warfare apparently continued at the time of its reenactment.

Repetition of the statute in the same form occurs in the revision of the Penal Code of 1833. At this time, "abolitionism," "nullificationism" and Indian troubles[23] seem to have created conditions of sufficient stress to warrant continuance of the provision in the Code revision without debate.

In the Georgia Code of 1861 the provisions again appeared.[24]

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[22]O. H. Prince's *Digest of Laws of Georgia*, 1822, page 346.

[23]Coulter, *op. cit.*, page 286; R. P. Brooks, *History of Georgia*. Georgia offered $5,000 reward for Garrison, denominated by Governor Schley as a fanatical insurrectionist masquerading under philanthropy. Nat Turner's bloody insurrection had just taken place in Virginia. Georgia, furthermore, contemplated nullification of, and refused to pay, the Federal tariff of 1832. In 1825 there had been virtual civil war over Indian lands. Indian troubles came to a head in the removal of the Cherokees from Georgia. However, the Senate and Assembly Journals of Georgia, between 1832 and 1834, contain no discussion of the insurrection statute and, so, it is impossible to assert positively that existing conditions were believed to require reenactment. The provision may have been carried forward automatically without specific consideration.

[24]In Section 4214. Sections 4704-4706 show the emphasis with which the provisions were made applicable to Negroes:

> "Section 4704. The following offenses, when committed by a slave or free person of color, shall be punished, on conviction, with death, viz.: Insurrection, or an attempt to excite it; * * *.
>
> "Section 4705. Insurrection shall consist in any combined resistance to the lawful authority of the master or the State,

(*Footnote continued on next page.*)

When substantially the present statute was passed in December, 1866,[25] it was no longer in terms restricted in application to those who incited slaves or Negroes to revolt. Slavery no longer existed and reasons of policy suggested that it would be unwise to have an apparent discrimination in the statute. But consideration of the setting in which it was passed shows, we believe, that it was aimed primarily at conduct analogous to that which had been the target of its predecessors and at other prospective dangers of a temporary character, all of which were the products of post-war conditions and the troubled period of adjustment between emancipation and the tranquil acceptance of new relationships which shortly ensued.

After the close of the War between the States, almost anarchical conditions prevailed in the South[26] and military governors were placed in charge of many of the States. In Georgia, a provisional governor was appointed by the President and plans were made for the restoration of Georgia to its status in the Union. But, first, it was nec-

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with intent to the permanent denial thereof, when the same is manifested or intended to be manifested by acts of violence —the mere resistance of the slave, or his attempt to escape, or actual escape, from the master, shall not constitute insurrection.

"Section 4706. Any attempt, by threats, persuasion, or otherwise, to induce other slaves to join in an insurrection in existence or contemplated, shall constitute an attempt to excite an insurrection."

[25]*Public Laws of Georgia, Penal Code*, 1866, page 152, approved December 15, 1866. The only difference between the statute as passed in 1866 and the present is that as a result of the decision in *Gibson* v. *State*, 38 Ga. 571, the penalty provision was changed (Georgia Laws, 1871, pp. 19-20) to embrace attempts to incite insurrection which that case held were not included. The definition of the offense was not changed.

[26]See footnotes 35-44, *infra*, and supported text.

essary for the State to conform to the conditions laid down by the President. The ordinance of secession was to be revoked[27] and the Thirteenth Amendment approved.[28] To this end the Provisional Governor called a State Convention[29] composed of men who, although native Georgians, had not been active secessionists[30]. The Convention gave way in December, 1865, to a State Legislature composed of conciliatory Southerners.

Among the matters considered by the Convention, and later by the Legislature, was statutory provision for the transition of the Negro from slavery to citizenship. Rights were to be given to the Negro, while white men's lives and property were to be protected.[31]

The desire of Georgia not to arouse opposition to its admission to the Union by enacting a Black Code distasteful to the North, and the desire to be rid of the courts of the Freedmen's Bureau,[32] probably prompted the introduction of a Freedmen's Code in Georgia in which, in blanket fashion, practically every reference to, and legal discrimination against, Negroes was removed from all then existing statutes, which statutes, however, were retained for

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[27]Which was done in the Constitutional Convention of 1865. See *Journal*, page 44.

[28]Slavery was abolished in Convention. See *Journal*, page 125. The Thirteenth Amendment was approved by the Legislature, December 5 and 6, 1865.

[29]*Documentary History of Reconstruction* (Fleming), I, 195, 163-4; Percy Flippin, *H. V. Johnson*, 270-1.

[30]Neither strong secessionists nor active unionists attended the Convention. Clara Thompson, *History of Reconstruction in Georgia*, pages 148-9.

[31]*Doc. Hist. Reconstr.*, I, 243.

[32]The Bureau courts were acting so illegally they had to be abolished. *Rept. of Gen. Tillson*, Senate Ex. Doc. #2, 39th Cong., 2d Sess., page 54.

all other purposes.[33] The Negro was not to be subjected to any other or different punishment from such as was prescribed for white persons committing like offenses.[34]

The Freedmen's Code gradually filtered into the law of Georgia in the Special Session of the Legislature, December, 1865, to March, 1866, and in amendments made in the regular session held during November and December, 1866.[35]

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[33]Because of hostile criticism of Black Codes of other States, Georgia did not make a separate code. *Savannah Herald,* February 13, 1866; *Macon Journal and Messenger,* February 23, 1866. The Code was passed probably to get rid of Bureau courts, erected by Federal authorities to insure protection of Negroes' civil rights just as the Bureau itself protected laborers from unconscionable contracts. Equal legal rights to Negroes in the civil courts would render the Freedmen's courts unnecessary. Clara Thompson, *History of Reconstruction in Georgia,* page 157. See further on Georgia's desire to conform with Northern demands, Coulter, *Short History of Georgia,* 342-3. However, the Code did not give the Negro equal political rights, such as voting and jury duty.

[34]Coulter, *op. cit.,* 342; Thompson, *op. cit.,* 157.

[35]The Constitutional Convention in November, 1865, resolved that a Committee of five be appointed to prepare a system of laws applicable to the changed conditions of the Negroes in Georgia (*Journal of the Constitutional Convention,* 1865, p. 174; *Confederate Records of Georgia,* ed. by Candler, IV, 414-5). The Provisional Governor, by request of the Convention, appointed the Committee (*Savannah Nat'l Republican,* Nov. 23, 1865). On December 19 this Committee reported to the Governor a series of eleven laws for the regulation of Freedmen's rights (*Report of Commrs. on Freedmen's Code to Gov. Jenkins,* December 19, 1865, a pamphlet; *Macon Telegraph,* January 9, 1866; incomplete copy in *Savannah Nat'l Repub.,* January 16, 1866). The preliminary report of the Commissioners was made to the Legislature on December 6 and was referred to the Judiciary Committee of each House (*Journal of House of Representatives of Ga.,* 1865/6, pp. 21-3, and *Journal of*

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The absence of records of debates on the Freedmen's Code or on the insurrection statute, leaves the precise reasons for the change to the statute in its present form in some doubt. It may have been a mere automatic renewal of the older insurrection law with references to slaves eliminated. It seems likely that policy (and the

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Ga. Senate, of same date; *N. Y. Tribune*, December 7, 1865). On December 14 Gov. Jenkins referred to the Negroes' sudden transition from slavery to freedom as the "sudden upheaving of an earthquake", and recommended that the Legislature consider the Freedmen's Code (*House Journal*, December 14, 1865).

On January 15, 1866, Gov. Jenkins transmitted a copy of the Report to the Legislature and recommended that it be adopted in toto as law (*Ga. House Journal*, 1865/6, January 15). The Governor said that the code "is just and liberal to the freedmen. * * * It is as safe as it should be to the citizen" (*Savannah Nat'l Repub.*, Supplement, January 22, 1866). On January 17, the Senate and the House agreed to a joint judiciary committee to consider the report (*Ga. House Journal*, 1865/6, January 17).

The Report referred to is prefaced by the following statement by the Commissioners:

> "We are sensible that in presenting this system of laws, we may be subjected to the imputation of having done at once too little and too much; too little for those who are expecting *an instant and speedy remedy for all the ills which the present crisis has brought upon us; too much for those whose prejudices have not yet yielded to the necessities of our situation.*
>
> "*The mischiefs to be remedied are enormous*, and there is more or less of an indefinite hope and expectation, that legislation will afford at once and with all certainty, the proper remedy. It is impossible that this hope can be gratified, this expectation realized. The results which are to ensue from such legislation, presents a problem that can only be wrought out by experience. A prominent factor in the solution must therefore be time. We cannot expect that for this our distressed people will patiently wait, and more or less of dis-

(*Footnote continued on next page.*)

abolition of slavery) to some extent dictated the omission of the limitation upon its application to uprisings of Negroes or Slaves. The conditions at the time of its passage combined the supposed dangers of uprising by former slaves with the new danger incident to the removal of some of the restrictions upon them. The period was an

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appointment must ensue. Prepared to accept this result, we shall not be mortified by intimations of feebleness, or imputations of failure, and shall be satisfied with the humble need of having honestly endeavored to do our part, and thereby contribute aid to those who are charged with the difficult duty of *guarding the State and the persons of color in our midst from the evils of sudden emancipation.*" (Italics ours.)

The Report proposed a system of laws in eleven articles. Article I provided in part:

"§1. A Convention of this State having recognized the emancipation of slaves, and having declared that neither slavery, nor involuntary servitude, except as a punishment for crime, shall ever be established in this State, all statutes, regulations, and municipal enactments concerning slaves, are therefore now inapplicable to the circumstances and conditions of our people.

§2. The statutes, regulations, and municipal ordinances concerning free persons of color in our State, having been passed with more or less of relation to the existence of slavery among persons of color in this State, are also, for reasons stated in the above section, now inapplicable to our circumstances and conditions, and are repealed, except as to offences committed before the passage of this act. * * *"

The Report continues with articles applying to county courts, the relations of husband and wife, parent and child, guardian and ward, master and servant, master and apprentice, the law of contracts, decedents' estates, the criminal law and licenses.

Article XI, entitled "Offences Relative to Persons of Color and Other Offences by White Persons", provided:

(*Footnote continued on next page.*)

interlude between the end of a familiar and the creation of a new relationship between different parts of the population; other sources of danger were inherent in post-war conditions; but all these troubles ended when harmony was established anew at the conclusion of the tragic era of Reconstruction.

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"§1. The Thirteenth Division, Part 4, Title I, of the Code of Georgia, concerning offences relative to slaves, being from Section 4487 to Section 4515, inclusive, is hereby repealed."

Section 3 provided:

"In all offences which require the concurrent action of two or more, committed by white persons and persons of color jointly, the offenders may be separately tried and punished according to the provisions of law for each class of such offenders."

Article XII, entitled "Offences by Persons of Color", provided in part:

"§1. The definitions of and circumstances constituting offences, including those in the foregoing article, the persons capable of committing them, and the defences allowed thereto, as also the rules of evidence and practice on the trial of offenders, wherever applicable, unless expressly excepted, shall be the same for persons of color, as for whites."

Speaking generally, the Report sought to assimilate the rights of Negroes to existing rights of white persons, but certain distinctions were continued. The Report contains no general code of criminal laws and no discussion or recommendation with respect to the insurrection statutes. However, Article XII, §6, provided:

"Any person of color who shall join or unite with any band, society, or association, formed without authority of law for the purpose of injuring white persons in person or property, shall on conviction be punished as provided in §4 of this Article, and shall be moreover liable to punishment for any overt act in violation of law, * * *."

(*Footnote continued on next page.*)

The conditions in Georgia and other Southern States, at the time of the passage of the statute in 1866, seemed, to many, pregnant with danger, due to the release of animosities and removal of the physical restrictions of slavery. From April, 1865, until the close of the Reconstruction period, Georgians continually expressed fears of slave insurrection, especially at Christmas time, 1865.[36]

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Article XI contained a somewhat similiar provision apparently aimed at white persons:

> "§13. Any person who shall be a member or associate of any band, association or combination, formed without authority of law, for the purpose of injuring persons of color, in their persons or property, whether under pretence of punishing crime, or otherwise, shall be guilty of a misdemeanor, and punished, on conviction, by fine or imprisonment in the common Jail or both, at the discretion of the Court; and shall moreover be liable to conviction and punishment for any overt act, according to law."

The Report contains no discussion of the provisions just mentioned, and it seems probable that they were directed, particularly, at organizations of the kind which flourished immediately after the War. (The only known copy of the Report is in the De Renne Georgia Library, Savannah, Georgia.)

[36]While Carl Schurz, Grierson and other Northerners scouted the basis for Southern fears of Negro insurrection (*N. Y. Daily Tribune*, October 28 and December 2, 1865, and March 7, 1866), the following references show vivid fear of Negro insurrection in the South: *Rept. of Joint Committee on Reconstruction*, 39th Cong., 1st Sess., pt. iii; House Misc. Doc., 41st Cong., 2d Sess., page 482; Senate Ex. Doc. #43, 39th Cong., 1st Sess., page 4; Senate Ex. Doc. #2 (Same Congress), page 5; II, *Doc. Hist. of Reconstr.*, 344; *Savannah Nat'l Repub.*, September 21 and November 16, 1865; *Civil War and Reconstr. in Ala.*, 1865-6 (Fleming), page 383 (reports fear of Negro insurrection in Alabama); *Appleton's Annual Cyclopedia*, 1865, page 627 (recites fear of insurrection in North Carolina); Stephenson and Fleming, *Confederacy and Reconstruction*, page 48; J. C. Harris, *History of Georgia to Recent Times* (1896).

Other temporary sources of danger to a community recently returned to the ways of peace after the disruption of a long war, intimately affecting its territory, existed. The Legislature naturally wished to assure the Federal authorities that all of the momentary threats to law and order could and would be controlled. Among the sources of possible trouble were the die-hard secessionists, incipient Ku Kluxers, "jawhawkers", "regulators", "black-horse cavalry"[37] poor whites,[38] "union leaguers", Freedmen's agents[39] and abolitionist ministers seeking to stir up Negro discontent[40] by extravagant promises of "40 acres and a

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[37]"Bands of men styling themselves 'Regulators', 'Jayhawkers' and 'Blackhorse Cavalry' have infested different parts of the State, committing the most fiendish and diabolical outrages upon the freedmen" (*Report of General Tillson*, November 1, 1866, Senate Ex. Doc. #6, 39th Cong., 2d Sess., p. 55; II, *Doc. Hist. of Reconstr.*, 360).

[38]Hostility existed between poor whites and free Negroes (Thompson, *Reconstr. in Ga.*, 129-131; Dennet in *N. Y. Nation*, February 1, 1866; Truman, *N. Y. Times*, November 23, 1865; *Joint Committee on Reconstr.*, 1866, pt. iii, pp. 42, 46, 129).

[39]Union leaguers controlled Negroes, II, *Doc. Hist. Reconstr.*, 3. R. P. Brooks, *History of Georgia*, describes the Freedmen's Bureau as a centre for office-seekers and idle Negroes, a political machine. See also *Ku Klux Rept.* (1871), *Georgia Testimony of Gen. Wright*, 272, *Ibid., Minority Rept.*, 441; *House Rep. Minority Rept.*, #121, 41st Cong., 2d Sess., pages 47, 53; J. Wall, a Negro, in his *Carpet Bag Rule in Florida*, said that the Bureau, with the best intentions in the world, was the worst curse of the race.

[40]R. P. Brooks, *Hist. of Ga.*, 324-7. Negroes were encouraged by agents of the Freedmen's Bureau and by the "carpet baggers" to believe that the white people's land would be divided among them.

mule" for every Negro.[41] In addition to these political rivalries giving rise to riotous acts, robbery, stock stealing and crimes of violence were common.[42] So great were the fears of disorders and insurrection that the Georgia Constitutional Convention, in November, 1865, requested the Provisional Governor to provide a police force in the several counties throughout the State. This was done before December.[43]

The source and root of these conditions lay in the many diverse consequences of the War.[44] The Negroes were

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[41]These elements were to resolve themselves after 1866 into the Radical Republicans, "scalawag southerners" and carpet-bag legislators opposed by the conservative Southerners and Ku Klux Klan. The latter organization was founded in Tennessee in May, 1866 (W. G. Brown, *Lower South in American History*, ch. IV). "There were scores . . . of secret protective and revoluntionary societies in the South, ranging from the small bodies of neighborhood police, which were common in 1865 and 1866, to the great federated orders like the White Camelia covering the entire South . . ." (II, *Doc. Hist. of Reconstr.*, p. 327).

[42]Conditions were so primitive that horse stealing was made punishable by death (Coulter, *op. cit.*, 330); stealing stock (Avery, *Hist. of Ga.*, p. 353); violence by whites against Negroes (*N. Y. Tribune*, September 4 and 15, 1865, February 6, 1866). Frequent examples of bushwacking, plundering and stealing by Negroes and young whites were recorded in the spring and summer of 1865 (*Official Records of War of Rebellion*, vol. XLIX, pt. ii, pp. 1061-2; vol. XLVII, pt. iii, pp. 595-6, 665-6; *N. Y. Times*, December 11, 1865; *N. Y. Herald*, May 20 and 21, 1865; *Macon Telegraph*, December 1, 30, 1865).

[43]Avery, *History of Ga.*, page 353; *Confederate Records of Georgia*, IV, 97, 100, 294; *Macon Telegraph*, May 24 and June 1, 1865 (expresses need of military authority against vagrants).

[44]See, generally: E. C. Woolley, *Reconstr. in Ga.*, pages 17-8; Flippin's *H. V. Johnson*, page 264 ff.; Thompson, *Reconstr. in Ga.*, page 43; Brooks, *Hist. of Ga.*, pages 302, 321; *Milledgville Federal Union*, January 9, 1866.

demoralized. Hoping for freedom from labor as a concomitant of emancipation, vagrant and vagabond Negroes swarmed towards the cities where death and starvation[45] alone were awaiting them. The demoralization of the Negro led to disruption of the labor system. The latter outcome, combined with the destruction of railways by Sherman, financial distress, Federal taxes, disorganization of agriculture and the growth of city population,—all brought about the destruction of the old social order of planters, lawyers and factors. Destruction of the old social system, decrease in white population and proportionate increase in black population, demanded a new adjustment of relations between the two races.[46] The fear entertained by Southerners that the Negroes would be stirred to insurrection by Christmas, 1865,[47] proved to be unfounded,[48] but conditions giving rise to disorder, and the fears thereof,[49]

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[45]Death rate: over 30,000 Negroes in one year in Augusta; 500 a month in Macon (*Savannah Nat'l Republican*, November 16, 1865; *N. Y. Times*, December 31, 1865; *Joint Committee on Reconstr.*, pt. iii, p. 173; *Confed. & Reconstr.*, Stephenson & Fleming, p. 41).

[46]Coulter, *op. cit.*, 331-5; Brooks, *Hist. of Ga.*; C. Thompson, *Reconstr. in Ga.*, Flippin, *H. V. Johnson.*

[47]See footnote 36 and text, *supra.*

[48]Some outrages occurred in the last week of December, 1865, and early January, 1866, but it was, in fact, an unusually quiet Christmas. *Milledgville Fed. Union*, January 2, 1866; *Savannah Nat'l Repub.*, January 1, 3, 10, 12, 1866; Stephenson and Fleming, *Confed. & Reconstr.*, 48; *Confed. Recs. Ga.*, IV, 44, Governor's message of January 8, 1866.

[49]*The Critical Year*, by H. K. Beale, pages 155-6: "The South swarmed with Radical trouble-makers and nascent carpet-baggers". In March, 1866, Grant had to forbid Negro celebration which threatened disorder in Richmond, Va. There was rioting in New Orleans,

(*Footnote continued on next page.*)

continued until several years after the enactment of the present statute in 1866.

This background and history seem to us to demonstrate that the statute was aimed at quelling possible disorders of the special and unprecedented kind threatened immediately after the Civil War. The dangers then facing the State soon passed with the natural adjustments which followed.

(*Footnote continued from previous page.*)

also rowdyism in Atlanta, Ga. (Thompson, *Reconstr. in Ga.*, 132). Clara Thompson, *Reconstr. in Ga.*, pages 361-394, discusses the Ku Klux Klan and social disorder which lasted from 1865 until 1871. Also see pages 116-7, 129-131. Note that the spirit of Georgia, itself, on the other hand, was to put down rioting and disorder. *Journal of House*, 1866, page 31, November 1, 1866, Gov. Jenkin's advice to the Legislature. "Our interest lies in eschewing political excitement, studiously avoiding all conflicts with the authorities, unchosen by us, but placed over us. . . ."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

Nos. 474 and 475

ANGELO HERNDON,

Appellant,

vs.

J. I. LOWRY, Sheriff of Fulton County,

Appellee.

ON APPEALS FROM THE SUPREME COURT
OF THE STATE OF GEORGIA

BRIEF FOR THE APPELLEE

M. J. YEOMANS, *Attorney General of Georgia.*
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Atlanta, Ga.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

Nos. 474 and 475

ANGELO HERNDON, *Appellant*

vs.

J. I. LOWRY, SHERIFF, *Appellee*

BRIEF FOR THE APPELLEE

STATEMENT

This is an appeal from a decision of the Supreme Court of Georgia upholding the constitutionality of section 56 of the penal code of Georgia, which provides:

> "Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection" (punishable by death, or, if the jury

recommend to mercy, confinement in the penitentiary for five to twenty years.)

The opinion of the Supreme Court of Georgia (R., 100) is reported in 182 Ga. 582.

The decision was rendered in a habeas corpus proceeding instituted by appellant in Fulton County Superior Court. He had been previously convicted in that court of violating the above penal section, and had been sentenced to a minimum of 18 years' imprisonment in the penitentiary under the jury's verdict. He had appealed from this conviction by the method laid down by Georgia law, motion for new trial, and to the overruling of said motion he had appealed by writ of error to the Supreme Court of Georgia, where the conviction was affirmed. See the lengthy opinion of the Supreme Court of Georgia, discussing the many points raised and discussing the sufficiency of the evidence, reported in 178 Ga. 832-868. See also the opinion of the same court rendered on motion for rehearing, in 179 Ga. 597-603.

After exhausting his remedy in the direct appeal, appellant brought his petition for habeas corpus which forms the basis for his present appeal. In this proceeding he contended that the statute under which he was convicted violates the "due process" clause of the Fourteenth Amendment to the U. S. Constitution by unduly restricting freedom of speech and of assembly, and for the additional alleged reason that said statute is too vague and indefinite. (R., 3). He alleged that the statute was unconstitutional in above respects both on its face, as construed by the Supreme Court of Georgia and "as applied" to him by the evidence in his original trial—which evidence he attached as an exhibit to the petition. (R., 11-86). He also alleged that the statute violated the Georgia Constitution on similar grounds.

The judge of Fulton Superior Court hearing the habeas corpus case decided in favor of appellant's contention as to vagueness and indefiniteness of the statute, and held against appellant's contention as to alleged unconstitutionality for undue restriction upon freedom of speech and of assembly.

(R., 89-91). Both sides appealed from this ruling to the Supreme Court of Georgia, which rendered the final opinion above referred to (182 Ga. 582), holding that the statute in question is not unconstitutional in any of the respects contended by Herndon. To this final decision by the Supreme Court of Georgia, appellant has brought this appeal.

SUMMARY OF ARGUMENT

I.

FREEDOM OF SPEECH OR ASSEMBLY NOT UNLAWFULLY ABRIDGED BECAUSE OF ANY INSUFFICIENCY OF EVIDENCE. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THE CHARGE OF ATTEMPTING TO INCITE INSURRECTION, AND CONVICTION UPON THIS EVIDENCE WAS NOT A DENIAL OF RIGHTS UNDER THE CONSTITUTION.

This division of our brief is an answer to the contentions and argument of appellant under his POINT I-A.

We concede that a State may not, consistently with the due process clause of the Fourteenth Amendment, penalize the advocacy of political, social or economic change to be achieved by lawful means or the organization of a group to further such advocacy.

We also concede that a State may not penalize the specific act of conducting or speaking at a peaceful meeting, with a lawful purpose, regardless of the purposes of the organization calling the meeting.

Herndon was not convicted for any particular speech or for any act of conducting a particular meeting. He was shown to have come to Atlanta as a paid organizer for the Communist Party and was engaged in working up an organization for the party in Atlanta, had actually obtained some members, and had called and conducted some meetings in the interest of furthering the organization. After his arrest he stated (R., 16) that the duties in which he was engaged as such paid organizer were "to call meetings, educate or dis-

seminate information regarding the Communist Party at these meetings, to distribute literature, to secure members for the organization and generally to work up an organization of the Communist Party in Atlanta."

When arrested he had in a box under his arm nine membership books in the Communist Party (R., 47-54), three pads each containing 42 certificates of contribution to Communist Party funds (R., 55-59) and a number of pamphlets and booklets which set forth the aims, plans and purposes of the Communist Party. The membership books set forth the conditions upon which members were accepted and the agreements that the members made upon joining the party, among these being the agreement to "accept the program and statutes of the Communist International and the Communist Party of the U. S. A." and the agreement that the members would subordinate themselves "to all decisions of the comintern and of the party" (the comintern being shown by the literature to be the executive committee of the international party). The authenticity of the literature was proven and was effectually admitted by the defendant.

One of the documents thus found in the defendant's possession was a booklet entitled *"The Communist Position on the Negro Question,"* which explained in detail the meaning of the communist slogan: *"Self-Determination for the Black Belt"* (which slogan appeared in the title lines of the Communist daily newspaper put in evidence and in the numerous other communist certificates and pamphlets). This slogan was declared in above booklet to represent the aim, purpose and demand of the Communist Party in the southern states, and was shown to include the following:

1st—That all land owned by the "southern white landlords" in this black belt be confiscated and turned over to the negroes.

2nd—That the present state boundaries, established for the convenience of the "white master class," be broken up and the state unity of the black belt established.

3rd—That in this black belt the *negroes* be given the complete right of self-determination; *the right to set up their own government,* and the right to separate from the United States if they wish.

This booklet had a map on the outside, showing that this so-called black belt extended through portions of Arkansas, Louisana, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina and Virginia.

This booklet also contained resolutions adopted by the Communist International ordering the Communist Party of the U. S. A. to adopt the above plan of "self-determination of the negroes in the black belt" (outlining it in great detail) as a program in the southern states. These resolutions declared that the party members should not limit themselves to propaganda for the "right of self-determination" but should *"organize mass actions such as demonstrations, strikes, tax boycott movements, etc."* The resolutions teemed with such words as "revolution" and "revolutionary," and said that this was a slogan of *"national rebellion."*

The resolutions closed with the declaration that the constant call of the communists to the negro masses must be: *"Revolutionary struggle against the ruling white bourgeoisie, through a fighting alliance with the revolutionary white proletariat."*

Other portions of the booklet, and other documents in the evidence, showed that the American Communist Party was obeying the orders thus given it by the Communist International and was actively trying to incite the negroes in the south to accomplish the above stated aims.

The literature also contained the usual and better known Communist principles and slogans, such as: "Against capitalist terror;" "For the defense of the Soviet Union;" "The Communist Party incorporates the whole body of experience of the proletarian struggle, basing itself upon the revolutionary theory of Marxism."

One of the pamphlets was a publication of the "Young Communist League" containing such incitements as *"Smash the National Guard, the C. M. T. C. and R. O. T. C."*

(All of the documents placed in evidence and above referred to were found in the box under Herndon's arm when he was arrested. (R., 47). Some other documents and bundles of papers were referred to in testimony as being found in his room, but these were not actually introduced in evidence.)

The above is far from complete as a summary. The outline contained under division I of this brief will give a better idea of the evidence.

We submit that the evidence in this case shows that Herndon was actually engaged in attempting to incite an insurrection, as defined and penalized by the Georgia statute, since he was actively engaged in organizing a branch of the Communist Party in Atlanta, and since the "Party" was shown definitely by its authentic literature to advocate the forceful overthrow of the lawful authority of the State by revolution or rebellion, the seizure of all land in the black belt belonging to white people, the abolition of the present state boundaries and the setting up of a new state or nation out of parts of Georgia and other states with sole control by negroes.

Appellant's argument that it is possible to imply only a peaceful meaning to such words as "revolution," "rebellion," "mass action," "tax boycott movements," "violence," "confiscation," "fighting alliance," and "revolutionary," is answered by citing the Fish Committee Report to the 71st Congress, House of Representatives Document 2290, Jan. 17, 1931, "Lenin's Complete Works," and Karl Marx' Manifesto of the Communist Party, all showing that the intent of the communists is not peaceful but forcible overthrow of governments.

Cases which have been cited by appellant in this connection are discussed and distinguished.

II.

GEORGIA'S STATUTE ON "ATTEMPT TO INCITE INSURRECTION," AS CONSTRUED, DOES NOT VIOLATE THE "DUE PROCESS CLAUSE" OF THE FOURTEENTH AMENDMENT BY UNLAWFULLY INFRINGING LIBERTY OF SPEECH OR ASSEMBLY.

Utterances tending to incite the overthrow of organized government by force and violence present a sufficient danger of substantive evil to bring their punishment within the police power of the government.

Section 56 of the Georgia Code is not one making any particular utterance or advocacy criminal, but it penalizes the use of any language and the doing of any acts when used or done under such circumstances as to constitute an actual attempt to incite an insurrection. The imminence of the planned insurrection is not a necessary element.

"Dangerous tendency" is the test applied in many federal and state decisions, in deciding whether the penalizing of certain language amounted to unconstitutional abridgment of freedom of speech.

"Clear and present danger," as a test, has not been followed by the line of federal decisions.

In Whitney v. Calif., 274 U. S. 357, the entire court accepted a rule different from the "clear and present danger" rule for which appellant now contends.

History of the Georgia statute shows it was passed to curb the substantive evil of attempting to incite people to insurrection. Time has not dimmed or varied this evil.

History of the Georgia statute, as given in Appendix to appellant's brief, is not complete or sufficient, and conclusion drawn is not correct. It was not "aimed" specially at insurrection among negroes, as contended, but against whites or negroes. (Historical references given.)

Factual proof as to the legislative intent, if relevant to the claim of unconstitutionality, should have been submitted in

trial court, instead of presenting a disputed issue such as this to the Supreme Court.

"Dangerous tendency" is the rational test to apply, instead of "clear and present danger."

III.

THE GEORGIA STATUTE, AS CONSTRUED, IS SUFFICIENTLY DEFINITE AND CERTAIN.

The statute definitely informs a person that he must not attempt to incite others to combined resistance by force to the lawful authority of the State, when he intends that such force shall come at some time as a direct result of his influence upon those whom he attempts to incite.

Supreme Court has upheld a statute penalizing the printing of an article that tends to encourage or incite the commission of crime or acts of violence, or which tends to encourage or advocate disrespect for law. *Fox v. Washington*, 236 U. S. 273.

Georgia statute is more definite than the California statute which was upheld against contention of unconstitutionality for vagueness in *Whitney v. California*, 274 U. S. 357, 368.

Other state decisions cited have upheld criminal syndicalism statutes against this contention,—some less specific than the California statute.

The Georgia Supreme Court has merely applied to this statute the "rule of reason" which the Supreme Court of the United States applied to the Anti-trust Act of 1890 in *Standard Oil Co. v. U. S.*, 221 U. S. 1, and *Nash v. U. S.*, 229 U. S. 373.

ARGUMENT

I.

FREEDOM OF SPEECH OR OF ASSEMBLY NOT UNLAWFULLY ABRIDGED BECAUSE OF ANY INSUFFICIENCY OF EVIDENCE. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THE CHARGE OF ATTEMPTING TO INCITE INSURRECTION, AND CONVICTION UPON THIS EVIDENCE WAS NOT A DENIAL OF RIGHTS UNDER THE CONSTITUTION.

In division I-A of his brief, appellant contends and argues at length that "there is no evidence that appellant advocated or attempted to induce others to resort to force or to engage in acts of violence." In this division of our brief we shall therefore answer this contention and point out the evidence establishing that Herndon was actually engaged in work as an organizer for the Communist Party in Atlanta, and that his activity amounted in fact to an attempt to incite insurrection. As a corollary of this, we contend that freedom of speech or of assembly was not unlawfully abridged by the conviction of Herndon upon this evidence.

At the outset we concede that a State may not, consistently with the due process clause of the Fourteenth Amendment, penalize the advocacy of political, social or economic change to be achieved by lawful means or the organization of a group to further such advocacy. This is one of the contentions of appellant which is therefore eliminated from argument.

We also concede that a State may not penalize the specific act of conducting or speaking at a peaceful meeting, with a lawful purpose, regardless of unlawful purposes of the organization calling the meeting.

The case against Herndon does not rest upon acts or conduct which may be explained as being innocuous, as the above. Neither was he convicted for making any particular speech, nor for any act of conducting a particular meeting.

The evidence in this case established the fact that Herndon had come to Atlanta from another state as a paid organizer for the Communist Party, and that he had no other business or interest in view in coming to Atlanta. The evidence did not show the exact time of his arrival, but it appeared that under a different name he had rented a post office box for the reception of mail in Atlanta in September, 1931. He was arrested and indicted in July, 1932. It appeared that during that period of time he had been working up an organization for the Communist Party in Atlanta, had actually obtained some members, and had called and conducted some meetings in the interest of furthering the organization. His admissions to the officers covered this much, and the nine membership books (filled out with the names and data of members) (R., 47-54), together with the record of various "minutes" of meetings found in the documents under his arm (R., 75-78) also showed this organizing activity.

Officer Watson testified: (R., 12). "He did not at first discuss the nature of his work, he did later on; as to the nature or purpose of his work, he said he was sent here by this Communist Party as an organizer for them, representing this Communist Party;" and "He told us they (the documents) were sent to him from headquarters of this Communist Party, in New York."

E. A. Stephens testified: (R., 16). "At that time he stated to me that his duties were, as organizer for the Communist Party, to call meetings, educate or disseminate information regarding the party at these meetings, to distribute literature, to secure members for the Communist Party in Atlanta. . . . He said he had held or attended two meetings, and then later when questioned about where they were held he designated the meeting places of three meetings that he had called and had been held, one of them on Auburn Avenue, I believe, one in the neighborhood of Tiger Flowers' home, as he expressed it, and one on East Cain Street, I think it was . . . said he only have five or six actual members at that time . . . actual members, as he put it; . . . At the time the officer

brought him there he brought that large pasteboard carton down there filled with quite a quantity of literature . . . "

Officer Watson testified: (p. 11). "At the time he unlocked his box and taken the mail out of the box, he had with him at the time a pasteboard box containing books, papers and pamphlets. I would recognize that box if I saw it; this box and its contents is what we taken off of him. I recollect examining the box after the arrest. I identify that box and those pamphlets as the contents of the box at the time of the arrest of this defendant."

The above mentioned pamphlets, contained in the box in the personal possession of Herndon, were the pamphlets and documents introduced in evidence and set forth in the printed Record, p. 47 to 85. See particularly R., 7, reciting that the documents introduced and set forth were in the box in Herndon's personal possession.

Officer Watson also testified that they found a lot of documents in Herndon's room, "newspapers, books, periodicals and such" (R., 12), and Mr. Stephens questioned Herndon about these, as shown by Stephens' testimony as follows: (R., 18).

> "I want to state, further, among the other things he said in talking to me about this quantity of literature here in the suitcase and in the grip, a part of which you will notice has never been taken out of the wrapper—there are several packages like this—in questioning him what this was sent to him for, he stated *for distribution at his meetings;* the same with reference to many of the books that he had in these two receptacles there."

The last named documents and bundles of periodicals found in Herndon's room were not introduced in evidence, but only the *fact* that he had them on hand and that they had been sent to him for distribution at his meetings was placed in testimony.

In Herndon's statement to the jury he denied none of the testimony to which we have referred, and made no statement

or explanation whatsoever with regard to the literature. The testimony above outlined, together with the reasonable inferences therefrom as to the extent and continuity of Herndon's activity in obeying the instructions given to him as an organizer from the Communist headquarters, may be taken as uncontroverted so far as this case is concerned.

ALL MEMBERS MUST FOLLOW INSTRUCTIONS FROM INTERNATIONAL HEADQUARTERS

Among the documents, found in a box under Herndon's arm at the time of his arrest (R., 92), were nine "Membership Books . . . of the Communist Party of the U. S. A.," containing the names of persons "admitted" to the party in Atlanta. These books also contained what purported to be "extracts from the Statutes of the Communist Party of the U. S. A.," some of which were as follows: "A member of the Party can be every person from the age of eighteen up *who accepts the program and statutes of the Communist International and the Communist Party of the U. S. A.,* who becomes a member of a basic organization of the Party, who is active in this organization, who subordinates himself to all decisions of the comintern and of the party, and regularly pays his membership dues. . . . The Communist Party, like all sections of the comintern, is built upon the principle of democratic centralization. These principles are: . . . Regular reporting of the party committees to their constituents. *Acceptance and carrying out of the decisions of the higher party committees* by the lower, strict party discipline, and immediate and exact applications of the decisions of the executive committee of the Communist International and of he Central Committee of the Party. . . . The basis of the party organization is in the nucleus (in factories, mines, shops, etc.) which all party members working in these places must join. The nucleus consists of at least three members. Newly organized nuclei must be endorsed by the leading committee of the Section in which the shop nuclei are organized. . . . The strictest party discipline is the most solemn duty of all party members and all party organizations. The decisions

of the CI and the party convention of the CC and of all leading committees of the party must be promptly carried out. Discussion of question over which there has been differences must not continue after the decision has been made."

In the same membership books we find the following question and answer: "What is the Communist Party? The party is the vanguard of the working class and consists of the best, most class conscious, most active, the most courageous members of that class. It incorporates the whole body of experience of the proletarian struggle, basing itself upon the *revolutionary theory of Marxism* and representing the general and lasting interests of the whole of the working class. The party personifies the unity of proletarian principles, of proletarian will and of proletarian revolutionary action. (From the program of the Communist International). We are the party of the working class. Consequently, nearly the whole of that class (in time of war and civil war, the whole of that class) should work under the guidance of our party, should create the closest contacts with our party (Lenin). He who weakens no matter how little the iron discipline of the party of the proletariat (especially during the period of dictatorship), effectually helps the bourgeoise against the proletariat (Lenin.)" (R., 52).

The authenticity of the literature introduced in evidence was effectually admitted by the defendant, as we have pointed out, and thus no reasonable question can be raised in this case as to the reality of its apparent source, whether it purports to be an expression from the New York headquarters or from the international headquarers of the Communist Party. The defendant himself was admittedly an organizer actively engaged in soliciting and obtaining members for the Communist Party, and therefore the recitals in these "membership books" are brought home to the defendant himself as a part of his solicitation.

PLAN OF THE COMMUNIST PARTY IN THE "BLACK BELT"

One of the documents found on Herndon's person and admitted in evidence was a booklet entitled *"The Communist Position on the Negro Question."* (R., 60-69). On the outside cover was a map of the United States, under which was the following: "Self-Determination for the Black Belt." The map had a dark belt across it, beginning with a portion of Arkansas and Louisiana, and extending generally eastward through the States of Mississippi, Alabama, Florida and Georgia, and thence up the coast through several states, South Carolina, North Carolina and Virginia.

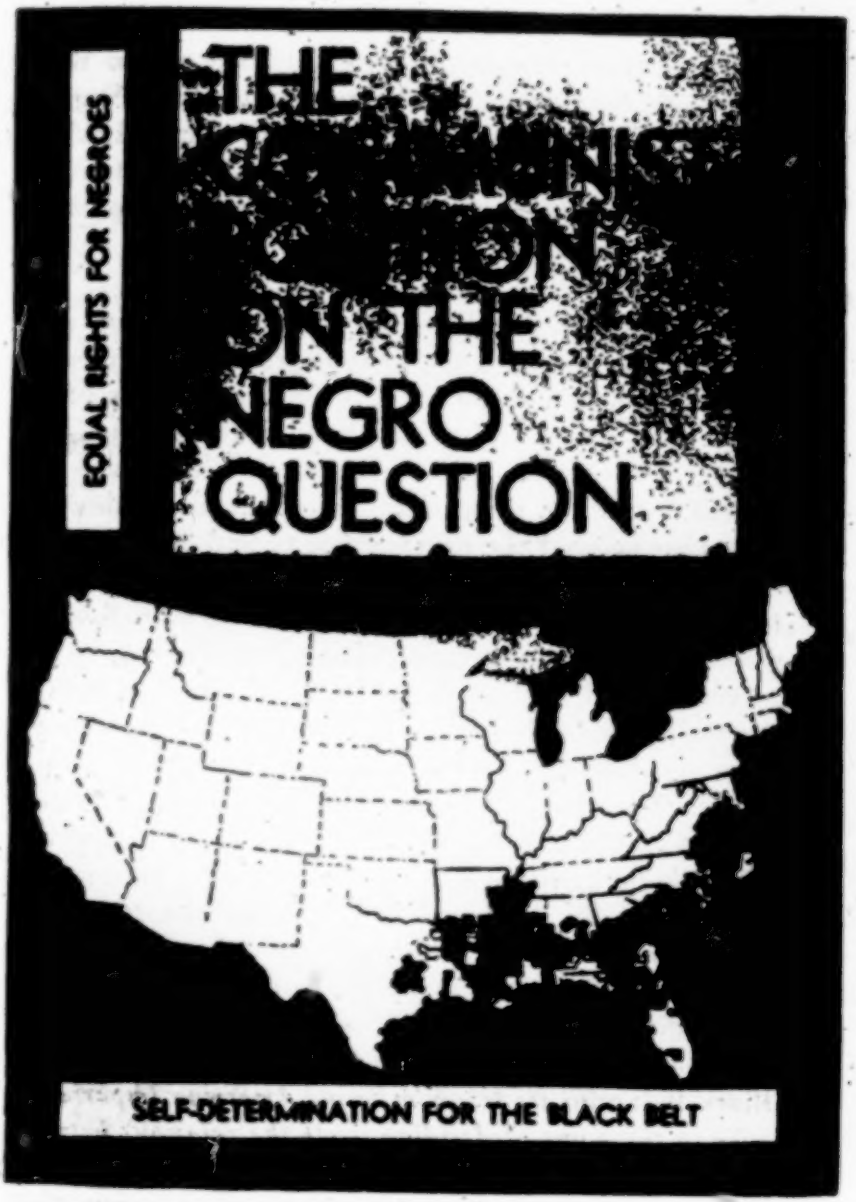
In order to present clearly the import of this document, its display of the slogan: "Self-Determination for the Black Belt," and the map which it portrayed, we reproduce it herewith on opposite page. (See Record, p. 60).

This booklet shows the source of the communist slogan of *"Self-Determination for the Black Belt,"* to-wit: "Resolution of the Communist International on the Negro Question in the United States," adopted October, 1930. (R., 63).

The opening portions of these Communist International resolutions point out how the Communist Party in the United States has been actively trying to win "increasing sympathy among the negro population," and that certain things have been advocated for the benefit of the negroes in the northern states, but that in the southern part of the United States *"the main Communist slogan must be: The Right of Self-Determination of the Negroes in the Black Belt."*

The Resolutions then proceed to point out what that slogan means, as follows: (R., 64-65.)

> "(a) Confiscation of the landed property of the white landowners and capitalists for the benefit of the negro farmers. . . . Without this revolutionary measure, without the agrarian revolution, the right of self-determina-


EQUAL RIGHTS FOR NEGROES
THE
ON THE
NEGRO
QUESTION
SELF-DETERMINATION FOR THE BLACK BELT

tion of the Negro population would be only a Utopia or, at best, would remain only on paper without changing in any way the actual enslavement."

"(b) Establishment of the State Unity of the Black Belt. . . . If the right of self-determination of the Negroes is to be put into force, it is necessary wherever possible to bring together into one governmental unit all districts of the South where the majority of the settled population consists of negroes. . . ."

"(c) Right of Self-Determination. This means complete and unlimited right of the negro majority to exercise governmental authority in the entire territory of the Black Belt, as well as to decide upon the relations between their territory and other nations, particularly the United States. . . . First of all, true right to self-determination means that the negro majority and not the white minority in the entire territory of the administratively united Black Belt exercises the right of administering governmental, legislative, and judicial authority. At the present time all this power is concentrated in the hands of the white bourgeoisie and landlords. It is they who appoint all officials, it is they who dispose of public property, it is they who determine the taxes, it is they who govern and make the laws. Therefore, the *overthrow* of this class rule in the Black Belt is unconditionally necessary in the struggle for the negroes' right to self-determination. This, however, means at the same time the overthrow of the yoke of American imperialism in the Black Belt on which the forces of the local white bourgeoisie depend. Only in this way, only if the negro population of the Black Belt *wins its freedom from American imperialism even to the point of deciding itself the relations between its country and other governments, especially the Unied States*, will it win real and complete self-determination. One should demand from the beginning that *no armed forces of American imperialism should remain on the territory of the Black Belt.*"

AMERICAN COMMUNIST PARTY FOLLOWED ABOVE ORDERS FROM MOSCOW

Upon reading the above revolutionary scheme hatched in the brains of the international leaders of the Communist Party meeting in Moscow, the question naturally arises and demands an immediate answer: Was the American Communist Party, of which Herndon was an "organizer," following the above instructions adopted by the international convention?

The same "black belt" pamphlet sets for the nominating speech of C. A. Hathaway, "delivered at the national nominating convention of the Communist Party proposing James W. Ford of Alabama for vice-president of the United States." (R., 62.) Substantial portions of this speech are set forth in the transcript of this case (R., 61-62), including the following:

> "OUR DEMANDS IN THE SOUTH.
>
> "In the first place, our demand is that the land of the Southern white landlords for years tilled by the Negro tenant farmers, be *confiscated* and turned over to the Negroes. . . .
>
> "Secondly, we propose to break up the present artificial state boundaries established for the convenience of the white master class, and to establish the state unity of the territory known as the 'Black Belt,' where the Negroes constitute the overwhelming majority of the population.
>
> "Thirdly, in this territory, we demand that the Negroes be given the complete right of self-determination, the right to set up their own Government in this territory and the right to separate, if they wish, from the United States.
>
> "Around these demands for the Negroes, as I have outlined them here—with the revolutionary white workers in the very forefront of the struggle—the unity of write workers, small farmers and the Negro masses can and must be established. . . ."

BLACK BELT SLOGAN PROMINENTLY DISPLAYED IN OTHER COMMUNIST LITERATURE

To the above damaging evidence against Herndon and the Communist Party, the brief for the appellant has a remarkable answer. It contends that they are exaggeration. See p. 21 of his brief, arguing that "American political tracts traditionally contain rhetoric and over-statement which the average reader naturally discounts and usually is intended to discount."

We shall therefore point out other evidence showing that the American Communist Party adopted the black-belt program instructed from Moscow.

The evidence showed that the title lines of the communist daily newspaper, known as the "DAILY WORKER," carried six planks of the Communist Party, three on the left and three on the right of the title of the paper, and that the fourth plank was: "Equal rights for the Negroes and *self-determination for the Black Belt.*" (R., 82-A.)

A reproduction of this, as shown by the transcript, is here presented on opposite page.

The copy of this newspaper which was introduced in evidence, being one of the papers found on the person of Herndon when he was arrested, bore date of July 8, 1932, and contained various news articles and editorials, among them being an article issued by "Central Committee, C. P. U. S. A." saying in part as follows: (R., 81.)

> "The Communist Party fights for peace, fights against imperialist war, fights for the defense of the only workers' republic in the world—the Soviet Union. . . .
>
> "The Communist Party is the only party which fights for equal rights for the negro people. It is the only party which fights for the right of the negro people to govern in the 'Black Belt' . . . .
>
> "Every penny you contribute will aid the Communist Party and the Daily Worker bring the program of the

VOTE COMMUNIST FOR

1. Unemployment and Social Insurance at the expense of the state and employers.
2. Against Hoover's wage-cutting policy.
3. Emergency relief for the poor farmers without restrictions by the government and banks; exemption of poor farmers from taxes, and no forced collection of rents or debts.

VOTE COMMUNIST FOR

4. Equal rights for the Negroes and self-determination for the Black Belt.
5. Against capitalist terror; against all forms of suppression of the political rights of workers.
6. Against imperialist war; for the defense of the Chinese people and of the Soviet Union.

> revolutionary working class to every nook and corner of the United States."

It will be noticed that in one of the documents found on Herndon labeled "Minutes of the Section Committee, July 10, 1932" it was recited: (R., 75.)

> "Organize special day for distribution of the 750 copies of the Daily's that we will get for our section."

"Section" is a prominent organization term among the Communists, as shown by each one of the nine membership books. (R., 48 et seq.)

The reference in these minutes of the section committee to "750 copies of the Daily's that we get for our section" undoubtedly meant 750 copies of the Daily Worker, the official "organ" of the Communist Party, U. S. A., according to its own title lines. The jury was certainly authorized to so find, especially in view of the fact that Herndon admitted to the officers that part of his duties as organizer for the Communist Party were "to call meetings, educate or disseminate information regarding the party at these meetings, *to distribute literature,*" etc., (R., 16), and the fact that the officers found newspapers, books and periodicals in Herndon's room which Herndon admitted had been sent to him from the Communist headquarters in New Work, (R., 12), and the fact that some of these newspapers and periodicals "had never been taken out of the wrapper" when found by the officers and carried to the court house (R., 18). Officer Watson's testimony shows that some of these bundles of newspapers found in Herndon's room were "batches" of "The Daily Worker." (R., 21-22). All this authorized the jury to find that Herndon as organizer was engaged, among other things, in distributing copies of the *Daily Worker,* as the minutes of the section committee above quoted indicated.

And with every copy of the *Daily Worker* went its incendiary slogan as carried in its title lines: *"Self Determination for the Black Belt."*

Next we point out that there was found upon Herndon's person three pads (42 certificates each) of *"certificates of contribution"* to Communist Party campaign funds, and that each of these certificates carried on the back thereof a tabulation of the same six Communist planks that were carried at the top of the Daily Worker,—the fourth plank being "Equal rights of the Negroes and self-determination for the Black Belt." (R., 55-57). These certificates had a blank place for Herndon to insert the name of the contributor, which according to the language of the certificate was to be delivered to the contributor. Attached to each "certificate" was a stub, in which Herndon was to write the name of the contributor, address, amount donated, etc. And with every such certificate delivered to the hands of a contributor, the slogan therefore would be carried: "Self-Determination for the Black Belt."

The outside of each of these pads of certificates was in red paper, and again carried the slogan, among others, of "Self-Determination for the Black Belt." (R., 59).

On the red back of each of these pads was also the following:

> "Every dollar collected is a bullet fired into the boss class. The success of this campaign depends upon your efforts. Read and subscribe to the Daily Worker."

OTHER SLOGANS OF THE COMMUNIST PARTY WERE OF INSURRECTIONARY NATURE

We have so far limited our discussion of the communist literature found on Herndon to the portions relating to the communist efforts to stir up the negroes to revolutionary action in the so-called Black Belt. But there were also other planks and slogans of a very insurrectionary nature. Among the planks carried at the top of every issue of the *Daily Worker* was: "(6) Against imperialist war; *for the defense of the Chinese people and of the Soviet Union.*"

Compare this with the slogans found in document No. 16 (R., 71), entitled "An Appeal to Southern Young Workers," setting forth what "the Young Communist League fights for." This included:

"8. *Against bosses' wars! Defend the Soviet Union!*
"9. *Smash the National Guard, the C. M. T. C. and R. O. T. C.!*"

A revealing explanation of the meaning of the above slogans will be found in Document No. 14 (R., 69-70), which was the July, 1932, issue of *The Communist*, a magazine of the "theory and practice of Marxism-Leninism," published monthly by the Communist Party of the U. S. A." The first article, an editorial, contained the following: (R., 70):

> "The capitalist class of the United States finds itself at the present time in the process of 'growing into' a new world war, *into the war against the Soviet Union.* . . . It is this peculiar tactic, followed by world capitalism under the screen of the most intense pacifist maneuvers, that we must concentrate on exposing before the masses in order to bring about a more determined and concrete struggle against the imperialist war and for *the defense of the Soviet Union.*"

And in connection with this, it will be noticed that every one of the communist membership books sets forth as a "communist principle" that everyone who becomes a member of the party must *accept and carry out the decisions of the executive committee of the Communist International.* (See R., 49). And every communist membership book also contains this: (R., 52):

> "We are the Party of the working class. Consequently, nearly the whole of that class (*in time of war and civil war, the whole of that class*) *should work under the guidance of our Party. . . .*"

Thus we see that the Communist Party openly predicts a war between the United States and the Soviet Union, and at the same time flaunts to its members and to all the people it can reach the Communist slogan; "Defend the Soviet Union," and binds all the members it can procure to the solemn agreement that they will "accept and carry out" all decisions of the Communist International organization, and exhorts them

that *specially in time of war and civil war* they should work under the guidance of the Communist Party, instead of under the leadership and guidance of the United States government!

And in order to cripple the United States government before the arrival of the predicted war, they exhort their prospective adherents to "Smash the National Guard, the C. M. T. C. and R. O. T. C." (R. 71).

Simultaneously with this they are appealing to the negroes who live in the so-called Black Belt to rise up and overthrow (R. 66) the existing rule in the Black Belt, establish their own government controlled solely by negroes, abolish the present state boundaries, carve out a new negro republic, secede from the United States if they wish, and "demand from the beginning that no armed forces of American imperialism should remain on the territory of the Black Belt!"

After surveying the above, can anyone doubt that the Communist Party and all its officers and organizers are shown by this evidence to be engaged in attempting to incite an insurrection?

COMMUNIST AIMS COULD NOT BE ACCOMPLISHED BY PEACEFUL MEANS

The brief of appellant, however, still contends that the proven aims and purposes of the Communist Party could be accomplished by peaceful means, that advocacy of these things "did not constitute advocacy of the use of violence against lawful authority." (Pages 23 and 24 of his brief). He says that abolition of the present state boundaries and establishment of the unity of the so-called Black Belt "could be done by constitutional amendment or possibly by compact among the States affected." (Page 23). And he says that even secession of the Black Belt "could be accomplished peacefully unless the opposition resorted to force and so precipitated a conflict!" (Page 20).

This argument is contrary both to logic and to the official pronouncements of the Communist Party. Placing the blame for inevitable bloodshed on the intended victims is as if an

armed burglar should enter your house and say, "Now I do not desire bloodshed. It is you who will be responsible for violence if you resist."

Violence and confiscation are the very essence of Communist plans and purposes, wherever they appear. The court judicially knows from the facts of history that the Communist seizure of power in Russia has been by violence and confiscation. Their official statements show that violence is a part of their plan, as we shall point out.

Even the Communist International edict which first promulgated this doctrine and slogan of "Self-Determination for the Black Belt" (R., 63 to 69), admitted that "The SLOGAN OF RIGHT TO SELF-DETERMINATION IS A REAL SLOGAN OF NATIONAL REBELLION." (R., 67). This admission is found in the following paragraph of the International Communist resolutions to which we have already referred; which is fairly teeming with terms of force and violence. (R. 67):

> "Hereby, every single fundamental demand of the *liberation struggle* of the negroes in the Black Belt is such that—if once thoroughly understood by the negro masses and adopted as their slogan—it will lead them into the struggle for the *overthrow of the power of the ruling bourgeoisie*, which is *impossible without such revolutionary struggle*. One cannot deny that it is just possible for the negro population of the Black Belt to win the right to self-determination during capitalism; but it is perfectly clear and indubitable that this is possible only through *successful revolutionary struggle* for power against the American bourgeoisie, through *wresting* the negroes' right of self-determination from American imperialism. Thus, the slogan of right to self-determination is *a real slogan of NATIONAL REBELLION*, which, to be considered as such, need not be supplemented by proclaiming struggle for the complete separation of the negro zone, at least not at present."

In another part of said Communist International resolutions launching the Black Belt plan, it is said: (R. 66).

> "Even if the situation does not *yet* warrant the raising of the question of *uprising*, one should not limit oneself at present to propaganda for the demand, 'Right to Self-Determination,' but should organize *mass actions, such as demonstrations, strikes, tax boycott movements*, etc."

What is a mass-action tax-boycott movement except a resistance by force against payment of taxes imposed by constituted government?

We see from all the foregoing that the Communist documents which Herndon had upon his person, and which evidently constituted his guide and instruction for his work as organizer in which he was engaged, set forth an unquestioned plan of force and violence against the lawfully constituted government, and that Herndon therefore was an accomplice in this attempt to incite an insurrection.

The evidence makes out a case against the Communist Party as principal in the first degree and against Herndon as principal in the second degree. The principal in the first degree is he who fires the shot (in murder, for example), while the principal in the second degree may fire no shot but is present aiding and abetting in the crime.

For further light on the question raised by appellant as to the construction that should be placed upon the statements in the Communist literature found under Herndon's arm, let us turn to well-known and authentic public documents and historical data. In appellent's brief and the appendix thereto he cites several score of non-judicial citations, including newspapers, histories, legislative reports, semi-official reports, etc. We shall therefore cite the following to show that the "peaceable accomplishment of Communist plans and purposes" (suggested in appellant's brief) is not the proper construction of the Communist advocacies, but that the Communist Party stands for *force and violence* and is actively engaged in *attempting to incite a revolution:*

FISH COMMITTEE REPORT IN 1931 UNBARED THE COMMUNIST ATTEMPTS TO INCITE REVOLUTION

House of Representatives Report No. 2290, 71*st Congress*, known as the *Fish Committee report*, contains ample data showing positively what the Communist Party is trying to do. The report summarizes the situation as follows, on page 15:

> "The Communist Party only uses the election laws to place its candidates on the ballot, in order to conduct open campaigns for their revolutionary principles. It advocates the overthrow of the Government by direct means, through *force and violence*, and despises the evolutionary method of democratic governments. It seeks to destroy our republican form of government, guaranteed by the Constitution, and to set up a dictatorship of the proletariat."

The Report quotes the acceptance speech of W. Z. Foster, Communist candidate for president of the United States, in 1928, as follows:

> "Our party, different from the Socialist party, creates no illusions amongst the workers that they can vote their way to emancipation, that they can capture the ready-made machinery of the State and utilize it for the emancipation of the working class. On the contrary, we must utilize this campaign to carry on widespread and energetic propaganda to teach the workers that the capitalist class would never allow the working class peacefully to take control of the state. That is their strong right arm and they will fight violently to the end to retain it. The working class must *shatter* the capitalist state. It must build a new state, a new government, a workers' and farmers' government, *the soviet government of the United States*. . . ."

The Report quotes the following (on page 15) from the published program of the Communist Party at its 6th world congress at Moscow in 1929:

"The Communists consider it unworthy to dissimulate their opinions or their plans. They proclaim openly that their designs can only be realized *by the violent overthrow of the entire traditional social order.*"

In accordance with this "openness" about the Communist plans, "Candidate W. Z. Foster" came before the Fish Committee and bodly made the following admissions, as set forth on page 11 of the Report:

"*The Chairman:* Do the Communists in this country advocate world revolution?"

"*Mr. Foster:* Yes; the Communists in this country realize that America is connected up with the whole world system, and the capitalist system displays the same characteristics everywhere . . . everywhere it makes for the misery and exploitation of the workers . . . and it must be abolished, not only on an American scale but on a world scale."

"*The Chairman:* So that they do advocate world revolution; and do they advocate revolution in this country?"

"*Mr. Foster:* I have stated that the Communists advocate the abolition of the capitalist system in this country and every other country; that this must develop out of the *sharpening of the class struggle* and the struggle of the workers for bread and butter."

* * *

"*The Chairman:* They are opposed to our republican form of government?"

"*Mr. Foster:* Most assuredly."

"*The Chairman:* And they desire to overthrow it through revolutionary methods?"

"*Mr. Foster:* I would like to read from the program of the Communist International at this point . . . 'The conquest of power by the proletariat *does not mean*

peaceful capturing of ready-made bourgeois state machinery by means of a parliamentary majority. The bourgeoisie resorts to every means of violence and terror to safeguard and strengthen its predatory property and political domination. Like the feudal nobility of the past, the bourgeoisie cannot abandon its historical position to the new class without a desperate and frantic struggle; hence the violence of the bourgeoisie can only be suppressed by the *stern violence of the proletariat.*'"

The above interesting colloquy continues to the point where Mr. Foster admits that the Communists "owe no allegiance" to the flag of the United States, for the reason that they term it a "capitalist flag." He also admits that the Communists of America "look upon the Soviet Union as their country." On page 9 the Fish Report says:

> "The Communists of the United States openly admit their allegiance to the Communist International at Moscow, and glory in the fact that they obey all the orders issued from there immediately and implicitly."

COMMUNISTS' ADVOCACY OF FORCE AND VIOLENCE LONG ADMITTED

The Report points out on page 5 that the *Communist Manifesto,* by Karl Marx, originally written in 1848 and reaffirmed by the Communist Party from time to time since, contains the following:

> "Communists scorn to hide their views and aims. They openly declare that their purpose can only be achieved by the *forcible overthrow* of the whole extant social order. Let the ruling classes tremble at the prospect of a *Communist revolution.*"

And the Fish Report quotes on page 65 the following from a 500-page *Report to the Senate,* by Hon. Charles Evans Hughes, in his capacity as Secretary of State, on Jan. 21, 1924:

> "It will be seen that the question of whether the Communist programs contemplate the use of force and vio-

> lence has been passed upon by every class of tribunal which could pass upon it, namely, Federal and State courts, administrative tribunals and legislative committees of both Federal and State governments, and in every class the result has been in support of the position that *force and violence are inseparable from Communist programs.*"

We have not at hand a copy of the above *Report to the U. S. Senate,* but we respectfully suggest that this Court call for a copy, particularly to procure the list (referred to above) of decisions of "Federal and State courts, administrative tribunals and legislative committees," establishing that "force and violence are inseparable from Communist programs." We presume that some of the court cases referred to are along the following lines:

In People v. Taylor, 187 Cal. 378, 203 P. 85 (1921), the defendant was convicted under two counts of an indictment charging violation of the criminal syndicalism act, and the first count (under which the conviction was affirmed by the California supreme court) charged that the defendant did "knowingly belong to an organization advocating sabotage," etc. The organization involved was the Communist Labor Party, and the finding was therefore that this party advocated sabotage.

A similar finding was made in *People v. Whitney,* 57 Cal. App. 449, 207 P. 698 (1922), which is the case that was carried to the United States Supreme Court and affirmed in *Whitney v. California,* 274 U. S. 357. The organization here involved was the Communist Labor Party of Oakland, "a local branch of the Communist Party of California" (207 P. 698), and one of the findings was that this party and its "affiliated organizations" were organized "to advocate, teach, aid, and abet criminal syndicalism," and that their "purposes and sympathies savored of treason."

(The rulings of *Whitney v. California,* 274 U. S. 357, will be discussed further in Divisions II and III of this brief).

Summarizing the finding in the *Whitney* case, which because of its affirmance by the Supreme Court of the United States becomes of great importance in the present case, Mr. Chief Justice Hughes said, in the recent decision in *DeJonge v. Oregon* (No. 123, decided Jan. 4, 1937):

> "In *Whitney v. California,* 274 U. S. 357, under the California statute relating to criminal syndicalism, the defendant was found guilty of wilfully and deliberately assisting in the forming of an organization for the purpose of carrying on a revolutionary class struggle by criminal methods. The defendant was convicted of participation in what amounted to a conspiracy to commit serious crimes."

In *People v. Lloyd,* 304 Ill. 23, 136 N. E. 505 (1922), it was held that the evidence sufficiently established that the Communist Labor Party advocated overthrow of the government by "force, violence and bloodshed." It was pointed out that the Communist Labor Party "stood by the principles of the Communist International formed at Moscow." See particularly headnotes 34, 35 and 60.

In *Com. v. Lazar,* 103 Pa. Super, 417, 157 A. 701 (1931), it was held that "evidence supported conviction for sedition on ground that language used by defendant advocated *revolution by Communists* as minority party."

In *State v. Boloff,* 138 Ore. 568, 4 P. 2nd, 326 (12), (1931), it was held that "the proof with much cogency indicates that the Communist Party (of the U. S. A.) *taught and advocated the use of violence, crime and sabotage* on proper instrumentalities in the winning of industrial and political ends." This decision gives extracts of the same Communist membership books that were introduced in the Herndon trial, as well as other Communist pronouncements and manifestoes.

In Lenin's Complete Works, Vol. Xviii, Page 361, the following definition of "dictatorship of the proletariat" is given:

"The dictatorship of the proletariat is nothing else than power based upon force and limited by nothing . . . by no kind of law and absolutely no rule."

CASE OF FISKE v. KANSAS DID NOT CONTAIN EVIDENCE THAT I. W. W. ADVOCATED FORCE AND VIOLENCE

Appellant cites the case of *Fiske v. Kansas*, 274 U. S. 380, where it was held that the Kansas criminal syndicalism statute as applied violated the due process clause of the Fourteenth Amendment. But the gist of that decision was that the evidence did not show that the I. W. W. advocated force or violence as a means of accomplishing its announced political and industrial aims. See the following, pages 386-387:

". . . And it is not as if the preamble were shown to have been followed by further statements or declarations indicating that it was intended to mean, and to be understood as advocating, that the ends outlined therein would be accomplished or brought about by violence or other related unlawful acts or methods."

The present case is plainly distinguishable because the documents and declarations of the Communist Party, for which Herndon was proven to be an organizer, teemed with proof that the party advocated force and violence as a means of accomplishing its aims.

Appellant also cites *Stromberg v. California*, 283 U. S. 359. But this case was reversed because the California statute authorized conviction for displaying a red flag or banner "as a sign, symbol or emblem of opposition to organized government," and the Supreme Court held that this clause was capable of being construed to include the "peaceful and orderly opposition to a government as organized and controlled by one political party by those of another political party equally high-minded and patriotic, which did not agree with the one in power" (page 369). And "it might also be construed to include peaceful and orderly opposition to government by legal means and within constitutional limitations." It was

therefore held that this clause was "repugnant to the guaranty of liberty contained in the Fourteenth Amendment."

In the present case, the Georgia statute is subject to no such criticism as above, and neither has it been applied to any conduct which was "peaceful and orderly opposition to government by legal means and within constitutional limitations."

DEJONGE CASE PRESENTED QUESTION VASTLY DIFFERENT FROM PRESENT CASE

Appellant also cites, in several places in Division I-A of his brief, the recent case of *DeJonge v. Oregon*, supra. Apparently he relies largely upon that case for a reversal of the present case. The *DeJonge* case is indeed eminent authority for many of the abstract principles included in the argument of appellant in the present case. But the principles there ruled are not disputed by us in any way. Mr. Chief Justice Hughes called attention, in that case, to the very distinctions upon which we rely:

> "It thus appears that, while defendant (DeJonge) was a member of the Communist Party, he was not indicted for participating in its organization, or for joining it, or for soliciting members or for distributing its literature."

On the other hand, the indictment in the present case charged that Herndon did "attempt to incite insurrection" and did "attempt to induce others to join in combined resistance to the lawful authority of the State of Georgia . . . with intent to defeat and overthrow the lawful authority of the State of Georgia by open force and by violent means and by unlawful acts," and, following the established plan of indictments for attempts, the indictment then set forth in various details *the manner* in which said attempt was committed. Among the details then alleged were (R., 7-10):

> (1) Accused did call and attend certain meetings "the purpose of said meetings and the purpose of said speeches being to *organize*, to establish and to set up a group and combination of persons, white and colored, under the name and style of The Communist Party of

America for the purpose of uniting, combining and conspiring to incite riots, to embarrass and impede the orderly processes of the courts and for the purpose of . . . overthrowing and defeating by force and violence the lawfully constituted authority of the State of Georgia. . . ."

(2) Accused did by speech and by persuasion, solicit persons "to join and to confederate with and to become members of the Communist Party" (with intent as above, etc.)

(3) Accused did introduce and circulate and did cause to be introduced and circulated and did aid and assist in introducing and circulating certain booklets, papers and other writings (with intent as above), "their full contents being of such a nature as that they cannot be copied in full in this indictment," but certain portions and extracts being then set forth in the indictment.

Thus it will be seen that the indictment in the present case was quite the opposite from the indictment in the *DeJonge* case.

Of course the nature of the present case and appeal, being a habeas corpus case brought after the affirmance of the conviction on the first appeal, precludes any argument as to the sufficiency or insufficiency of the indictment in its description of the meetings called by Herndon, or the people solicited, or the literature introduced or circulated. All that was a matter for hearing on demurrer to the indictment.

Herndon filed no demurrer, but filed a "motion to quash" in the trial court. After that was overruled, he was tried and convicted, and the conviction was affirmed by the Supreme Court of Georgia before this habeas corpus was instituted. See *Herndon v. State*, 178 Ga. 832.

The indictment plainly charged that Herndon did various acts as above outlined as part of a conspiracy to organize, establish and set up a group of persons for the purpose of

overthrowing the lawful authority of the State by force and violence, and that the same constituted an attempt to incite insurrection, in violation of the Georgia statute.

As said in the *DeJonge* decision, "the States are entitled to protect themselves from the abuse of the privileges of our institutions through attempted substitution of force and violence in the place of peaceful political action in order to effect revolutionary changes in government." And "these rights may be abused by using speech or press or assembly in order to incite to violence and crime."

II

GEORGIA'S STATUTE ON "ATTEMPT TO INCITE INSURRECTION," AS CONSTRUED, DOES NOT VIOLATE THE "DUE PROCESS CLAUSE" OF THE FOURTEENTH AMENDMENT BY UNLAWFULLY INFRINGING LIBERTY OF SPEECH OR ASSEMBLY.

We come now to a discussion of appellant's contention that the Georgia statute, penal code sec. 56, penalizing "Attempt to Incite Insurrection," as construed by the Supreme Court of Georgia, violates the "due process clause" of the Fourteenth Amendment to the Constitution of the United States.

The construction which appellant contends gives to the Georgia statute the tinge of unconstitutionality is set forth in the following language of the Georgia Supreme Court's decision in the *Herndon* case:

> "The statute means then that any attempt to induce others to come together in any combined resistance to the lawful authority of the State shall constitute an attempt to incite an insurrection and shall be punishable as stated. It is immaterial whether the authority of the State was in danger of being subverted or that an insurrection actually occurred or was impending. . . . " (178 Ga. 854.)

> "Force must have been contemplated, but, as said above, the statute does not include either its occurrence or its imminence as an ingredient of the particular

offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but it would be sufficient that he intended it to happen at any time, as a result of his influence, by those whom he sought to incite. It was the intention of this law to arrest at its incipiency any effort to overthrow the State government, where it takes the form of an actual attempt to incite others to insurrection. . . . " (178 Ga. 855.)

(*On Motion for Rehearing*:) "Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen *at any time within which he might reasonably expect his influence to continue to be directly operative* in causing such action by those whom he sought to induce. . . ." (179 Ga. 600.)

It will be noted that the Georgia statute is not one making any particular utterance criminal, but it penalizes the use of *any language* when used under such circumstances and with such intent as to constitute an actual attempt to incite an insurrection.

Appellant contends, in effect, that the Constitution of the United States guarantees to him the right to use any language he wishes, even though it be used under such circumstances and with such intent as to constitute an actual attempt to incite an insurrection, unless there is a "clear and present danger" of his succeeding in his attempt to incite an insurrection. And since the Georga statute, as construed by the state supreme court, does not make "probable success" of the insurrectionary attempt an essential ingredient of the offense, appellant contends that the Georgia statute is violative of the federal constitution.

RIGHT OF FREEDOM OF SPEECH NOT UNLAWFULLY ABRIDGED

We could phrase no more forceful language to answer this contention than the following oft quoted words from the decision of the United States Supreme Court in the case of *Gitlow vs. New York*, 268 U. S. 652:

> "That the utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. ***And the immediate danger is none the less real and substantial because the effect of a given utterance can not be accurately foreseen.*** The state can not reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale.
>
> "A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It can not be said that the State is acting arbitrarily or unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. *It can not reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction;* but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency."

At this point the *Gitlow* decision (p. 669-670) cites the following language from *People v. Lloyd*, 304 Ill. 23, 136 N. E. 505; 512:

> "Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to

> overthrow the government *without waiting until there is a present and imminent danger of the success of the plan advocated.* If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law."

The case of *People v. Lloyd,* supra, which was cited approvingly in more than one place in the *Gitlow* decision, was a conviction in 1920 of thirty-nine members of the Communist Labor Party under the Illinois statute which made it an offense for any person "openly to advocate by word of mouth or writing the reformation or overthrow by violence or any other unlawful means of the representative form of government now secured to the citizens of the United States and the several states by the constitution of the United States and the constitutions of the several states," etc. The gist of the ruling, insofar as applicable to the *Gitlow* case and to the case now at bar, is:

> (6) "The Legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government, *without waiting until there is a present and imminent danger of the success of the plan advocated.*"

Justice Story's work on the Constitution (5th ed.), § 1880, is cited on page 634 of the *Gitlow* decision. On this subject that eminent authority, in expounding the First Amendment which declares: "Congress shall make no law abridging the freedom of speech or of the press," wrote as follows: (§ 1880)

> "That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, public or private therefor, is a supposition too wild to be indulged by any rational man. . . . A man might, out of mere malice and revenge, accuse another

of the most infamous crimes . . . might inflict the most distressing punishments upon the weak, the timid, and the innocent; might prejudice all a man's civil and political, and private rights; and might stir up sedition, rebellion, and treason even against the government itself, in the wantonness of his passions or the corruption of his heart.

"Civil society could not go on under such circumstances. Men would then be obliged to resort to private vengeance to make up for the deficiencies of the law; and assassinations and savage cruelties would be perpetrated with all the frequency belonging to barbarous and brutal communities.

"It is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always that he does not injure any other person in his rights, person, property, or reputation; and so always that he does not thereby disturb the public peace, or attempt to subvert the government."

"DANGEROUS TENDENCY" IS TEST APPLIED IN DECIDING CONSTITUTIONALITY OF STATUTES RESTRICTING FREEDOM OF SPEECH

The *Gitlow case* (page 668) also cites approvingly the case of *State vs. Holm*, 139 Minn, 267, 166 N. W. 181 (2), L. R. A. 1918-C, 304. This decision upholds the constitutionality of a Minnesota statute which made it "unlawful for any person to teach or advocate . . . that the citizen of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States," against the contention that it was violative of section 1 of the 14th amendment to the federal constitution. On this point the *Holm* case declares: (p. 183 of 166 N. W.)

"To what extent this amendment takes from the States the power to place legislative restrictions upon the free-

dom of speech and the freedom of the press is still a mooted question; but, conceding that it protects this right from abridgment by the States, the freedom secured thereby is not an unlimited license to speak and to publish whatever one may choose. It is settled that the State may prohibit publications or teachings which are *injurious to society, or which tend to subvert or imperil the government or to impede or hinder it in the performance of its public and governmental duties* without infringing the constitutional provisions which preserve freedom of speech and of the press."

The standard here adopted is *"dangerous tendency."* If the writings or speech have a "dangerous tendency," viewed from the standpoint of governmental and social safety, then the State has a right to penalize such writings and speech without infringing the constitutional right of freedom of speech and press. This same standard was adopted and applied by the Supreme Court of the United States in the following cases in 1919 and 1920, upholding convictions in federal courts of violating the Espionage Act of 1917 against contentions that the right of freedom of speech and press was unconstitutionally abridged:

Debs vs. U. S., 249 U. S. 211.
Abrams vs. U. S., 250 U. S. 616.
Schaefer vs. U. S., 251 U. S. 466.
Pierce vs. U. S., 252 U. S. 239.

"CLEAR AND PRESENT DANGER OF SUCCESS" NOT REQUIRED UNDER SUPREME COURT'S RULINGS

Appellant contends that before a person can be penalized for attempting to incite an insurrection by use of words of incitement, it must be shown that there exists a "clear and present danger of the success" of his plan. And in support of this contention he cites the case of *Schenck vs. United States*, 249 U. S. 47. This was an affirmance of a conviction in a federal court of violating the Espionage Act of 1917, in which the decision said:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Cangress has a right to prevent."

But in a later part of the *Schenck* decision (page 52), Justice Holmes said something which we can just as well point to as supporting the "dangerous tendency" rule instead of the "clear and present danger" rule:

> "If the act (speaking, or circulating a paper), *its tendency and the intent with which it is done,* is the same, we perceive no ground for saying that success alone warrants making the act a crime."

And in the four cases which followed the *Schenck* case within the course of a year and a half (*Debs, Abrams, Schaefer* and *Pierce* cases, supra) the Supreme Court absolutely abandoned all reference to any necessity for "clear and present danger," and affirmed the convictions upon the principle of "*dangerous tendency.*"

For instance, in the *Pierce case* (252 U. S. 239, 243), one of the points which went up for decision was the contention that the judge erred in refusing to sustain the demurrer, one of the grounds of which was (3rd) "that there was a failure to show a *clear and present danger* that the distribution of the pamphlet would bring about the evils that Congress sought to prevent by the enactment of the Espionage Act." As to this contention the majority of the Supreme Court held, seven to two (Justices Holmes and Brandeis dissenting):

> "Whether the statements contained in the pamphlet had a *natural tendency* to produce the forbidden consequences, as alleged, was a question to be determined not upon demurrer, but by the jury at the trial." (Page 244.)

Thus the majority of the court ignored the contention that the state of facts did not present a "clear and present dan-

ger" as unnecessary even to answer, or else held (in effect) that these words only meant "a natural tendency to produce the forbidden consequences."

The *Gitlow* decision (on p. 671) actually summarizes the *Schenck* case as holding that in the case of a general statute (penalizing a substantive evil without specifying the words declared to be unlawful), "the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if *its natural tendency and probable effect* were to bring about the substantive evil which the legislative body might prevent" (citing *Schenck* and *Debs* cases). Thus the Supreme Court treated the *Schenck* case, when considered in the same picture with the subsequent *Debs* case, as applying the *dangerous tendency* rule, which, we have pointed out above, has been applied in so many other cases that it has become the established rule.

Likewise, in *Abrams vs. United States* (250 U. S. 616), in which five Russians were convicted under the Espionage Act for distributing pamphlets appealing to "workers" to oppose and resist the government in its war activities, the Court held (seven to two) that there was no infringement of the constitutional freedom of speech and press, because (page 624) "the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war" and "the defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war."

The basis upon which the *Abrams* case was affirmed was the *intent*, as illustrated in the above quotations, disregarding the question whether the case presented any "clear and present danger" of the defendants' plan succeeding.

While Justices Holmes and Brandeis dissented in the *Abrams* case, the dissenting opinion which was written by Mr. Justice Holmes also indicates a departure from the "clear and present danger" rule. For he says (page 628):

> "But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil *or an intent to bring it about* that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."

This certainly recognized and admitted that there would not always have to be a "present danger of immediate evil" to warrant a legislative curtailment of freedom of speech and press, but that the *intent* of the inflammatory speaker or writer was sufficient basis for punishing him regardless of whether there was in fact a "present danger" of his succeeding. Mr. Justice Holmes continued as follows in the dissenting opinion in the *Abrams* case (page 628):

> " . . . Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions *for the very purpose of obstructing, however, might indicate a greater danger, and at any rate would have the quality of an attempt.* So I assume that the second leaflet, if published for the purposes alleged in the fourth count, might be punishable."

IN WHITNEY v. CALIF., ENTIRE COURT ACCEPTED DEPARTURE FROM "CLEAR AND PRESENT DANGER" RULE

While the cases discussed in the last few pages of this brief (*Debs, Abrams, Schaefer.* and *Pierce* cases), were all cases of violating the *Espionage Act,* and therefore involved the principle of resistance to the prosecution of the war, it cannot be said that this fact controlled the trend of the decisions or is responsible for the departure from the "clear and present danger" rule.

The *Gitlow* decision, supra, (268 U. S. 652) was decided in 1925, and the case of *Whitney v. California,* 274 U. S. 357, in 1927. Both of these were State court prosecutions

for violations of State criminal syndicalism statutes, in which the appellants contended that the statutes violated the 14th Amendment to the Constitution of the United States by unduly infringing the right of freedom of speech, assembly, etc.

Both the New York and the California statutes in question were upheld by the Supreme Court as constitutional exercise of police power by the States.

While the *Gitlow* case was affirmed by a divided court, seven to two, Justices Holmes and Brandeis dissenting, the *Whitney* case was affirmed without any dissent. Justices Holmes and Brandeis filed a separate opinion concurring in the result, with slightly different argument and reasoning.

The most noticeable thing about the *Whitney* decision, insofar as a present consideration of it is involved, is the fact that both of the opinions rendered in the case (the main opinion and the special concurrence) indicate the acceptance of a departure from or modification of the "clear and present danger" rule of the old *Schenck* case. The main opinion, filed by Justices Taft, Van Devanter, McReynolds, Butler, Sutherland, Stone and Sanford, declared: (page 371)

> "That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by *utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means,* is not open to question. *Gitlow v. New York,* 268 U. S. 652, 666-668, and cases cited."

(It will be noticed that the test of constitutionality above applied to statutes abridging the freedom of speech is *"dangerous tendency"*—utterances "tending" to "endanger the foundation of organized government," etc.)

And in the special concurring opinion, written by Mr. Justice Brandeis in the *Whitney* case, and concurred in by Mr. Justice Holmes, the following significant language is used: (page 373).

> " . . . Although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, *or is intended to produce*, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled. See *Schenck v. U. S.*, 249 U. S. 47, 52."

Thus it was definitely stated in this special concurring opinion that if certain speech is used *with intent to bring about a clear and imminent danger to the State* (such as, for example, an intent to bring about the State's overthrow by violent means), then the speech may be penalized by the State.

This language is remarkably close to the language of the Georgia Supreme Court in denying the motion for rehearing in Herndon's case, wherein it was said: (179 Ga. 600)

> "Force must have been contemplated . . . but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce."

In reading the United States Supreme Court decision in the *Whitney* case (274 U. S. 357), and also the California decision which it affirmed (57 Cal. App. 449, 207 P. 698) we see nothing to indicate that there was any evidence of a "clear and present danger" that the defendant and her associates in the Communist Labor Party might succeed in bringing about the revolution which their platform was shown to

advocate. The California statute that Miss Whitney was convicted of violating provided that "any person who organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism is guilty of a felony and punishable by imprisonment." (See p. 360 of 274 U. S.)

The evidence against Miss Whitney showed (a) that she joined and participated as a committee officer in a convention held by the Communist Labor Party, and (b) that the platform and avowed principles for which the party stood were revolutionary in nature and advocated violence as a means for the proletariat to overthrow the capitalist government. The case, therefore, is quite plainly a parallel to that of Herndon. The Supreme Court's decision in the *Whitney* case (pages 363 to 365 of 174 U. S.) sets forth quotations from the Communist Labor party's platform and literature, showing a remarkable parallel to some of the evidence adduced in the *Herndon* trial.

The California statute did not limit its application to cases where there was "clear and present danger," nor did the evidence show any "clear and present danger" that the defendant and her associates would succeed in their revolutionary plan.

Indeed, there appears nothing anywhere to indicate any greater likelihood or danger of the communists' success in California than in Georgia.

This shortcoming, if it be such, did not keep the Supreme Court of the United States from affirming the conviction in the Whitney case, against constitutional contentions similar to those in the present case.

Therefore the *Whitney* decision is eminent authority for our position that "clear and present danger" is not an essential element of the constitutional test to be applied to state statutes abridging freedom of speech and assembly.

"DANGEROUS TENDENCY" RULE APPLIED BY U. S. SUPREME COURT IN SUSTAINING MINNESOTA STATUTE

Between the time of the *Debs* decision and the *Gitlow* and *Whitney* decisions, there came up for decision the case of *Gilbert v. Minnesota,* 254 U. S. 325. In this case the question was up for consideration as to whether the Minnesota statute making penal "speaking against enlistment" was an unconstitutional infringement upon the right of freedom of speech. The statute being construed was the same one that the Minnesota Supreme Court had already declared constitutional in the case of *State vs. Holm,* 139 Minn. (supra), which as we have pointed out was cited approvingly in the *Gitlow* decision. In this case, likewise, the United States Supreme Court cited approvingly the *Holm* case. (See page 329.) The Supreme Court held that the Minnesota statute did not unlawfully abridge the right of freedom of speech, and *in so doing made no mention whatever of any "clear and present danger" rule.* The decision pointed out and dwelt considerably (pages 332, 333) upon the fact that the evidence indicated that Gilbert's *intent* was the discouragement of enlistment in the army during war time, but the decision pointed out *no "clear and present danger"* that his words would have any effect of actually obstructing enlistment, but on the other hand seems to have been based upon the fact that the prohibited speech had a "dangerous tendency." This fact is brought out more clearly by inspecting the dissenting opinion of Mr. Justice Brandeis, who expressed the opinion that the statute was unconstitutional because "it abridges freedom of speech and of the press, not in a particular emergency, in order to avert a *clear and present danger,* but under all circumstances. Mr. Justice Holmes did not join in this dissent, but concurred in the result reached by the majority.

HISTORY OF GA. STATUTE SHOWS IT WAS PASSED TO CURB SUBSTANTIVE EVIL OF ATTEMPTING TO INCITE TO INSURRECTION. TIME HAS NOT DIMMED OR VARIED THIS EVIL

Appellant's brief presents the argument that because this statute was passed in 1866 the Legislature of Georgia has not determined "that activities such as those in which Herndon was engaged presented a present danger of substantive evil which the State may prevent." (Page 43 of his brief). And in the summary of their appendix (on page 73) it is contended that the Georgia statute was not "*aimed*" at the sort of conduct alleged against Herndon but was "aimed at quelling possible disorders of the special and unprecedented kind threatened immediately after the Civil War."

We might just as well say: the history of the law of murder shows that it was not *aimed* at the gangster method of "taking a person to ride," for this method of committing murder was not practiced at the time the law came into being, and that for this reason the murder law should not be invoked against these modern innovators!

When the robbery laws were enacted in the newly-created Western states of America, the only type of robbery known was the stage-coach robbery. We might say of this, as appellant's counsel says of Georgia's insurrection law, "the conditions at which it was aimed have disappeared." Yet this fact would hardly prevent the robbery laws from being applied to the automobile bandits of the crowded cities of today, who by their acts bring themselves within the terms of that ancient and honorable law.

We have on the statute books of Georgia, and probably in most other states, an offense known as "carrying concealed weapons." This was passed before machine-guns were in existence. Modern invention produced them later. But if a gangster is arrested with a concealed machine-gun and charged with violating that ancient statute against "carrying concealed weapons," it would hardly lie in his mouth to contend that the Legislature had not determined that the carrying of con-

cealed machine-guns was an evil to be prohibited, since they had come into existence after the enactment of the statute.

Appellant's attempt to argue around the *Gitlow* decision by the contention that the present Georgia statute (sec. 56) was passed in 1866, when the Georgia Legislature could not possibly have had the Communists in mind, will avail him naught, for the Communists of today have brought themselves under the terms of the Georgia statute of 1866 (re-enacted in 1871), and the Legislative finding of 1866 and 1871 that "attempting to incite an insurrection" was a sufficient menace to society to call for an abridgment of freedom of speech in this respect stands as true today as it did then.

FACTUAL "PROOF" AS TO LEGISLATIVE INTENT SHOULD HAVE BEEN SUBMITTED IN TRIAL COURT

In Appendix B of appellant's brief, (adopted as part of his argument on page 42 of his brief) appears what purports to be a "history" of Section 56 of the Georgia law. Extracts are quoted from various private documents and public reports, showing where somebody said certain things at various times and places alluded to. Appellant offers this as "factual proof" of his contention that the Georgia Legislature did not have in mind such conduct as Herndon was engaged in when Section 56 was first passed in 1866, or when it was re-enacted in 1871. (See Ga. Laws, 1871, p. 19, as to re-enactment.)

We do not admit the correctness of this alleged factual proof. We shall point out certain extracts and quotations which we have found in similar documents, indicating that the conclusion drawn by appellant's brief is not entirely correct.

But first we ask: Why should the Supreme Court be burdened with this dispute between appellant and appellee as to the reasons actuating the Georgia Legislature in enacting this statute in 1866 and 1871? The "reasons" of the Legislature for enacting the statute are of course not a matter of judicial

notice. If judicial notice covered the subject, there would be no necessity for the citation of these dozens of reports, letters and other documents in an effort to prove what the Georgia Legislature had in mind in passing this law.

There is a recognized way to present "factual proof" upon an issue such as this. It should be presented in the trial court, where both sides would have ample opportunity to present evidence as to the Legislative intent and as to the conditions that brought forth the statute which is being attacked as unconstitutional. See: *Pacific States Box & Basket Company v. White*, 296 U. S. 176 (11) 185:

> "(11). When legislative exercise of the police power is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, *or to other legitimate proof*, that the action is arbitrary."

The above is practically a restatement of what was said in *Borden's Farm Products Company v. Baldwin*, 293 U. S. 194, 209. In the Borden case the Supreme Court commented that "the factual basis of appellant's contention is disputed and there are no findings disclosing it." (p. 208). And since in that case evidence had been tendered in the trial court, in the nature of "factual proof" to support the alleged unconstitutionality of the statute, without any findings by the trial court upon said tendered evidence, the Supreme Court remanded the case to the trial court for determination of the factual question presented, it being considered of such importance that it would likely have determined the case.

REPLY TO "APPENDIX B"

While we do not feel that the Supreme Court should be burdened with this disputed factual discussion concerning the intent of the Georgia Legislature in 1866 and 1871 in passing

this statute, we do not wish to let the statements and conclusions of appellant as set forth in his Appendix B go unchallenged.

He declares in this Appendix that "from April, 1865, until the close of the Reconstruction period, Georgians continually expressed fears of slave insurrection, especially at Christmas time, 1865." (See page 69 of his brief). And he refers to this same contention on page 72 and in other places, in summing up his conclusions that the Legislature "aimed" this statute at insurrection among liberated slaves.

While we do not doubt that this fear existed, in some parts, there is also evidence that there was considerable fear on the part of governmental authorities that the *white people themselves* would break out in renewed civil war, and this statute was aimed just as much against them as against the negroes.

See Vol. I, *Doc. History of Reconstruction (Fleming)*, page 59, giving extracts from *Report of Joint Committee on Reconstruction*, 39th Congress, quoting General Grierson as follows:

> "I believe that there is an organization existing now throughout the South for the renewal of the rebellion. Many circumstances or things which have occurred since the surrender make me believe so." (1865.)

Appellant cites this congressional committee report and this historical work, on page 69 of his brief. The same historical work, on page 59, quotes the *Carl Schurz report to President Johnson* (1865) as reciting that there were then four classes of people in the South, one class consisting of "the incorrigibles, who still indulge in the swagger which was so customary before and during the war, and still hope for a time when the Southern Confederacy will achieve its independence."

Another well known work, *Reconstruction in Georgia*, by Mildred Thompson, instructor of history at Vassar College (Columbia Univ. Press) on page 163, summarizes the *Carl*

Schurz Report to President Johnson as expressing "omens of recurring rebellion and re-enslavement." On page 165, this book points out that "the basis on which Congress acted in enforcing new reconstruction upon the Southern States in 1865 was that they were still in a condition of war." The author then declares that there was in fact no real danger of any new rebellion in Georgia, though there was in some other States.

In this setting then (perhaps combined with appellant's reported rumor of insurrection among the newly liberated slaves) the Georgia Legislature passed the present insurrection statute in 1866.

Coulter's *Short History of Georgia* points out, on page 343, that the law which was passed in 1866 providing that "anyone attempting to incite combined resistance through violence against the State should suffer death" was an expression by the State of a willingness to support and maintain the newly constituted authority within the State. Coulter here recites that by this and other laws passed in 1866 "Georgia felt that she was showing full loyalty to the Union and proper respect to her conquerors, without heaping disgrace upon herself by abandoning the memories of her past heroism."

It is also worthy of note in this connection that Georgia reaffirmed this statute by amending it in December, 1871, specifically making the punishment clause apply to "Attempts to incite insurrection," after the Supreme Court of Georgia had held in *Gibson v. State*, 38 Ga. 571, that the penalty clause was defective. See Acts 1871, page 19.

Thus we see that this statute expresses a legislative finding in 1866 (and reaffirmed in 1871) that attempting to incite people to combined resistance to the lawful authority of the State constituted a sufficient substantive evil to call for an abridgment of freedom of speech in this regard.

It makes no difference whether the Legislature particularly feared an insurrection by white people or an insurrection

by negroes. The danger to the State would be just as real, whether the insurrectionists were white or black.

This legislative inquiry and finding made in 1866 and reaffirmed in 1871 is just as true today as it was then. Time has not dimmed its value as a legislative enactment.

There is a remarkable parallel between the recent attempts of the Communist party to incite the negroes to seize the land of all white people in the "black belt" and to set up an independent negro nation there, and the attempts which appellant declares in his brief were being made in 1866 to incite the newly liberated slaves to insurrection.

Calling a thing "Communism" today doesn't make it any different from the incitements of 1866, if in fact it is similar.

SIZE OF COMMUNIST VOTE IMMATERIAL, BALLOT ACTIVITY BEING MERELY A CAMOUFLAGE TO CLOAK REVOLUTIONARY INCITEMENTS

On page 43 of his brief, appellant asks the Supreme Court to take judicial cognizance of some statistics which he presents on the size of the Communist vote in Georgia. From these figures which he offers he asks the Court to deduce the conclusion that "there was no clear and present danger to the authority of the State arising from petitioner's activities or those of others."

In reply, we ask the Supreme Court to take judicial cognizance of the findings of the *FISH COMMITTEE* of Congress, as set forth in *House of Representatives Report No.* 2290, 71*st Congress, page* 15,—

> "It is impossible to state, with any exactness, the number of communists and active sympathizers there are in the United States. Estimates by the various witnesses have ranged from 50,000 to 2,000,000. It is the consensus of the witnesses that 70 per cent of the Communists in this country are aliens and, therefore, can not vote. The record also shows that there were over 100,000 *votes* cast for the various Communist state-wide

> candidates in 18 States. . . . Based on this data, therefore, it is the belief of the committee that there are probably 500,000 or 600,000 Communists and active sympathizers in the United States. . . . The sworn daily circulation of Communist newspapers of 262,000 also clearly indicates that the number of Communists and active sympathizers is not less than a half million, and probably more . . . "

And as pointed out previously in this brief, in Division I of the argument, the *Fish Committee* also found and reported to Congress that "the Communist Party only uses the election laws to place its candidates on the ballot in order to conduct open campaigns for their revolutionary principles."

"DANGEROUS TENDENCY" THE RATIONAL TEST, INSTEAD OF "CLEAR AND PRESENT DANGER"

In closing our argument under this division of our brief, we ask the Court to consider the question: *When does a danger become "clear and present?"* With reference to murder, would it be (1) when the ax is poised in the air and about to fall upon an unsuspecting victim, or (2) when the potential murderer gets the weapon and holds it behind his back with intent to use it when the opportunity unfolds, or (3) when a group of conspirators gather behind the barn and plot and plan an attack upon the master of the house?

Would the expression, "clear and present danger" apply to the second and third instances above? Who can answer that question with authority?

It can be argued that No. 2 does not present a case of "clear and present danger" because the potential murderer may change his mind before the opportunity to use the weapon unfolds. And it can be argued that No. 3 does not present a case of "clear and present danger" because the conspirators might decide not to make the attack that day but to put it off until another more opportune day.

It might be provable that the "actual danger" is very great in any of the above instances, even though opinions might

widely differ as to whether the danger were a "present danger" or not.

If "clear and present danger" is made an essential element of the constitutional test to be applied before the law may restrain conspirators against the government, then how shall it be decided whether the danger is "clear and present" or not?

The courts of the land would be called upon from time to time to say what constitutes a clear and present danger, and eventually it would reach the highest court in the land, which is the Court to which this brief is addressed.

Will the Court say that "clear and present danger" to the government would exist only when a mob is surging through the street, threatening to shoot down the officials of the government they wish to overthrow?

Suppose the Court answers: "No, the State need not wait till then, but it may consider the danger clear and present when anyone is speaking to a crowd urging them to go to the halls of government and kill or throw out the established officials." Then, when revolutionary speakers and writers advocate force and violence and address incendiary incitements to an impatient and dissatisfied mob, but accompany their words with the qualification, "now don't do it yet—prepare and make ready for the day, but wait until we give you the word to begin," *the hands of law enforcement officers would be tied!* They would have to wait until the danger became "clear and present," and when that happened it would be too late to prevent bloodshed. In the words of the *Lloyd* case *(304 Ill. 23)*, quoted in the *Gitlow* decision, *(268 U. S. 652, 669-670)*,

> "If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law."

The rational test is "dangerous tendency," which has been so often expressed and applied, as pointed out previously in this brief. And applying this test, there will be no doubt of the outcome of the present case. For the *Whitney* decision (274 U. S. 357, on page 372) pointed out that the organizing and banding together of people for such avowed purposes as are advocated by the Communist Party constitutes a "great danger" which authorizes an abridgment of freedom of speech under the police power of the States. The decision says:

> "That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals, is clear. We cannot hold that, as here applied, the act is an unreasonable or arbitrary exercise of the police power of the state, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the state."

III

THE GEORGIA STATUTE, AS CONSTRUED, IS SUFFICIENTLY DEFINITE AND CERTAIN.

Appellant contends that the Georgia statute under which this conviction took place, as construed by the Supreme Court of Georgia, violates the due process clause of the Fourteenth Amendment because of alleged vagueness and uncertainty.

In construing this statute the Georgia Supreme Court held that in order to be guilty of "attempting to incite insurrection" a person must attempt to induce others to join in combined resistance to the lawful authority of the State, and that in so doing *he must intend that force be used.* In further explanation, as to *when* the force must be intended to ensue, the court said:

> "Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce."

This is not vague or indefinite. The statute, as stated and construed, definitely informs a person that he must not attempt to incite others to combined resistance by force to the lawful authority of the State when he intends that such force shall come at some time as a direct result of his influence upon those whom he attempts to incite. Thus *intent to bring about force* as a direct result of his incitement is declared to be a necessary element of the offense.

The statute of the State of Washington, considered and held constitutional in *Fox v. Washington,* 236 U. S. 273, was analogous in many respects to the statute now up for consideration, though the evil there dealt with and penalized did not involve "forceful resistance to the lawful authority of the state" but only "disobedience of law" and "disrespect for law." The Washington statute provided:

> "Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or *inciting,* or having a *tendency* to encourage or incite the commission of any crime, breach of the peace, or act of violence, or which shall *tend to encourage or advocate disrespect for law* or for any court or courts of justice, shall be guilty of a gross misdemeanor."

This statute was attacked, *by demurrer,* as being unconstitutional, and upon conviction Fox appealed to the Supreme

Court of Washington, where it was held that the statute was not violative of the Fourteenth Amendment, that it did not unlawfully abridge freedom of speech, and that it was not void for uncertainty. (See page 276 of 236 U. S.). The decision of the United States Supreme Court, written by Mr. Justice Holmes, intimates that the statute would have been unconstitutional if it had been construed "to prevent publications merely because they tend to produce unfavorable *opinions* of a particular statute or of law in general," but (quoting Mr. Justice Holmes):

> "We understand the state court by implication, at least, to have read the statute as confined to encouraging an actual breach of law. Therefore the argument that this act is both an unjustifiable restriction of liberty and *too vague* for a criminal law must fail."

The headnote summarizes the decision as follows:

> "A statute which . . . makes criminal the editing of printed matter tending to encourage and advocate disrespect for law, cannot be said to violate U. S. Const., 14th Amend., as being an unjustifiable restriction of liberty, and too indefinite for a criminal statute, where the highest state court, by implication at least, reads the statute as confined to encouraging an actual breach of the law, and in the case at bar has merely construed it as embracing an article encouraging and inciting a persistence in what would be a breach of the state laws against indecent exposure."

(It will be noted that this decision is relevant also to the preceding division of this brief. There is no mention of any "clear and present danger" that the incitement would be acted upon by the persons encouraged by the document. The decision upheld the statute because it penalized the publishing of articles *encouraging people to commit actual violations of law*. And the law violations involved were not matters that contained any danger of overthrow of the government or forceful resistance to it.)

The decision of the *Fox* case in the Washington supreme court (71 Wash. 185), cited only one case on the question of alleged vagueness of the statute, to-wit: *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, which held:

> "6. Due process of law is not denied a corporation convicted of violating the Texas anti-trust laws of May 25, 1899, and Mar. 31, 1903, because the legislation permits and the trial court charged that there may be a conviction not only for acts which accomplish the prohibited result, but also for those which *'tend'* or are *'reasonably calculated'* to bring about such result."

"RULE OF REASON" HAS BEEN APPLIED BY THIS COURT TO QUALIFY PENAL STATUTE

In *Standard Oil Co. v. U. S.* 221 U. S. 1, the Supreme Court of the United States was construing the Anti-trust Act of 1890, which provided as follows:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in (#) restraint of trade or commerce, among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor. . . . " (P. 49 of 221 U. S.)

At the point marked: (#) in the above Act of Congress, the Supreme Court of the United States "by construction" inserted the word: *"unreasonable,"* so that the statute was converted into one which penalized the making of any contract, or combination, etc., *in unreasonable restraint of trade.* See the portion of the opinion extending from p. 49 to p. 62, and also the following headnote:

> "The Anti-trust Act of July 2, 1890, c. 647, 26 Stat. 209, should be construed *in the light of reason;* and, as so construed, it prohibits all contracts and combinations which amount to an *unreasonable or undue restraint of trade* in interstate commerce."

Now who would decide whether a contract which was somewhat in restraint of trade was in *unreasonable* restraint of trade? Manifestly that would be decided by the Court or jury, according to the facts and circumstances of each case as it might be presented in court.

One set of men might hold that a certain contract or combination tending somewhat to restrain trade was in *unreasonable* restraint of trade, and another set of men might decide to the contrary upon the same state of facts.

And it might be argued that a prospective defendant could not tell beforehand whether a contract which he was about to sign would be in *unreasonable* restraint of trade or not, and therefore he would not know whether he was about to commit a crime or not!

(This would be similar to the argument of appellant that under the rule of reason applied by the Georgia Supreme Court to the insurrection statute he would not know beforehand whether his incitement would amount to a violation because he could not tell beforehand what view a jury might take of the element of "reasonableness.")

These considerations did not prevent the Supreme Court of the United States from announcing and applying the "rule of reason" in the above decision construing the Anti-trust Act.

Appellant may seek to answer this argument by saying: The Supreme Court of the United States did not *discuss* the question of vagueness and uncertainty in the *Standard Oil* case, and therefore they probably did not consider that question — and besides, that was a civil proceeding and not a criminal case.

NASH CASE APPLIED THE ANTI-TRUST ACT IN CRIMINAL LAW, AND HELD IT NOT TOO VAGUE OR INDEFINITE

The complete answer to these arguments will be found in the following case, which was rendered by the Supreme Court

a few years after the *Standard Oil* case, and considered the contention of alleged vagueness and uncertainty of the statute in a case of *criminal conviction* under the same Anti-trust Act:

Nash v. U. S., 229 U. S. 373, 57 L. ed. 1232.

Nash was convicted in the U. S. district court for the Southern District of Georgia for violating (with others) the Anti-trust Act of 1890. We see from the recitals on p. 1233 of 57 L. ed., that counsel for Nash presented the following *contention* to the Supreme Court, and backed it up with argument and citation:

> "The law is bad as a penal statute, because it is not sufficiently definite and explicit to advise parties what they may and may not do under the law."

In order to show that the exact point, and even the exact arguments, involved in the present case were presented to the Supreme Court in the *Nash* case, we wish to give at some length here the discussion of this phase of the case by Mr. Justice Holmes:

> "The objection to the criminal operation of the statute is thought to be warranted by *Standard Oil Co. v. U. S.*, 221 U. S. 1 . . . and *U. S. v. American Tobacco Co.*, 221 U. S. 106. . . . Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by *unduly* restricting competition or *unduly* obstructing the course of trade. 221 U. S. 179. And thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. The kindred proposition that 'the criminality of an act cannot depend upon whether a jury may think it

reasonable or unreasonable; . . . There must be some definiteness and certainty,' is cited from the late Mr. Justice Brewer, sitting in the circuit court. *Tozer v. U. S.*, 4 Inters. Com. Rep. 245, 52 Fed. 917, 919.

"But, apart from the common law as to the restraint of trade thus taken up by the statute, *the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.* If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. *'An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it' by common experience in the circumstances known to the actor.* 'The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw.' *Com. v. Pierce,* 138 Mass. 165, 178, 52 Am. Crim. Rep. 264, 5 Am. Crim. Rep. 391; *Com. v. Chance,* 174 Mass. 245, 252, 75 Am. St. Rep. 306, 54 N. E. 551. 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.' 1 East, P. C. 262. If a man should kill another by driving an automobile furiously into a crowd, he might be convicted of murder, however little he expected the result. See *Reg. v. Desmond,* and other illustrations in Stephens' Dig. Crim. Law, art 223, 1st ed., p. 146. If he did no more than drive negligently through a street, he might get off with manslaughter or less. *Reg. v. Swindall,* 2 Carr. & K. 230, 2 Cox, C. C. 141; *Rex v. Burton,* 1 Strange, 481. And in the last case he might be held although he himself thought that he was acting as a prudent man should. See the *Germanic Oceanic Steam Nav. Co. v. Aitken,* 196 U. S. 589, 596. But without further argument, the case is very nearly disposed of by *Waters-Pierce Oil Co. v. Texas,* 212 U. S. 86, 109, where Mr. Justice Brewer's decision

and other similar ones were cited in vain. *We are of the opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act.*"

In accordance with the above reasoning, the first headnote summarizes the ruling as to this point in the following succinct language:

* * *

HEADNOTE OF NASH CASE

1. "There is no such vagueness in the Anti-trust Act of July 2, 1890, as to render it inoperative on its criminal side, because only such contracts and combinations are within the act as, by reason of intent, or of the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition, or unduly obstructing the course of trade."

GEORGIA STATUTE MORE DEFINITE THAN CALIFORNIA SEDITION STATUTE UPHELD AGAINST CLAIM OF VAGUENESS

The Georgia statute now being considered is more definite and certain than was the California statute under which Miss Whitney was convicted, and which was sustained in *Whitney v. California*, 274 U. S. 357, 368, against the contention that the California statute was "repugnant to the due process clause by reason of vagueness and uncertainty." The decision recites that she was convicted under Sec. 2, Subd. 4, which was as follows:

"Any person who . . . (4) organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism, is guilty of a felony."

And criminal syndicalism was defined in the Act as:

"Any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage

(which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or other unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."

One might ask (paraphrasing appellant's argument) *"when must the accused intend* that the change in industrial ownership or control must take place, when he acts as an 'organizer' or member of a group or society advocating force and violence to accomplish such change?" The California statute does not answer this question. It might just as logically be contended, therefore (as it is contended in the present case), that the above California statute violates the "due process" clause of the Fourteenth Amendment to the U. S. Constitution because of vagueness and uncertainty.

But the *Whitney* decision held that the California statute was *not* unconstitutional or void for vagueness or uncertainty. The headnote (No. 5) summarizes the ruling upon this point as follows:

"A statute defining the term 'criminal syndicalism' as any doctrine or precept advocating, teaching or aiding, abetting the commission of crime, sabotage, which is defined as meaning wilful and malicious physical damage or injury to physical property, or unlawful acts of force and violence, or unlawful methods of terrorism, *as a means of accomplishing a change in industrial ownership* or control or effecting any political change, and providing punishment for anyone who organizes or becomes a member of any organization to advocate, teach, or abet criminal syndicalism, *is not so vague and uncertain as to violate the due process clause of the Federal Constitution.*"

The decision in above case, on p. 369, cites and follows the principle which the United States Supreme Court had already ruled in the *NASH* case (supra) (dealing with the Anti-Trust

Act in its criminal side), the *FOX* case (supra) (sustaining the Washington statute against the contention of vagueness), and cites several others which we will here list:

Miller v. Strahl, 239 U. S. 426, 434.
State v. Hennessy, 114 Wash. 351, 364, 195 Pac. 211.
State v. Laundy, 103 Or. 443, 460, 204 Pac. 958 (14).
Peo v. Ruthenberg, 229 Mich. 315, 325, 201 N. W. 358.
Peo v. Steelik, 187 Cal. 361, 372, 203 Pac. 79.
Peo v. Lloyd, 304 Ill. 23, 34, 136 N. E. 505.

On page 368 the *Whitney* decision points out that the criminal syndicalism statute of California then under attack "has no substantial resemblance to the statutes held void for uncertainty under the Fourteenth and Fifth Amendments in the cases of *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221, and *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 89, because of not fixing an ascertainable standard of guilt. These two cases, thus distinguished, are cited and relied upon by appellant on pages 49 and 50 of his brief.

THE LIMITATION PLACED UPON THE TIME-ELEMENT OF THE INTENT IS IN DEFENDANT'S FAVOR

It will be noticed that the alleged indefiniteness of which appellant complains in the Georgia statute as construed is *not an indefiniteness of any act* but is merely an alleged indefiniteness in the time-element of the *intent* required to make the act penal.

In order to point out or accentuate the unreasonableness of appellant's contention that Section 56 is void for vagueness, we will present an analogy from the law of "intent" in bribery. Giving or offering to give a reward to an official, with *intent to influence his official behavior*, is of course bribery. Such intent is a necessary element in all bribery statutes that have come to our attention. But many well-considered decisions have held that the "official behavior"

which accused intends to influence need not be in a matter *then* pending, and need not even be in a matter then known to the parties, but may be in such matters as may arise in the scope of the official's duties from time to time. For instance, the Supreme Court of Massachusetts held in *Comm. v. Lapham*, 156 Mass. 480, 31 N. E. 638 (2):

> "It is not necessary that the indictment (for bribery) aver that the corrupt intention to influence the act or judgment of the inspector was in relation to any specific matter then pending before him; it is enough to aver a corrupt intention so to influence him in any matter pending before him, *or which may by law come or be brought before him.*"

Now suppose it were contended by someone that the above Massachusetts law had no limit as to the time-element involved in the intent to influence official behavor, and suppose the Massachusetts Supreme Court should answer:

> This statute does not mean that there is no limit whatever as to when the official's conduct was to be influenced, but as to this element it would be sufficient if the accused intended that it shuld happen *at any time within which he might reasonably expect his influence to continue to be directly operative* in causing such action by the official whom he sought to influence."

This limitation upon the time-element involved in the intent would be *in the defendant's favor*, and would be a perfectly reasonable limitation to place. It would be applying the "rule of reason" which the Supreme Court of the United States applied in the *Standard Oil Company* case and the *Nash* case, supra, and which the Georgia Supreme Court applied in the *Herndon* case in construing Section 56.

Criminal law is replete with statutes requiring certain "intent" as a necessary element of the crime, and they usually place no time limit as to *when* the accused must intend that the result be accomplished. For instance, see all the forgery statutes containing "with intent to defraud," etc. As to all

of these it would be reasonable and proper for the Courts to declare that the intent involved is an intent to accomplish the desired result within such time as the accused might *reasonably* expect his influence or his act to be directly operative in producing the result which he desires.

STATUTE PRESUMED TO BE CONSTITUTIONAL, AND NOTHING IS PRESENTED AGAINST SEC. 56 SUFFICIENT TO OVERCOME THIS PRESUMPTION

This Court has often expressed itself as to the strength of the presumption of constitutionality of a statute. Chief Justice Marshall said that before an act of the law-making power should be set aside as unconstitutional, "the opposition between the law and the constitution should be such that the judge feels a clear and strong conviction of their incompatibility with each other." *Fletcher v. Peck*, 6 Cranch, 128.

In the *"Sinking Fund cases,"* 99 U. S. 700, 718, the court said:

> "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."

Justice Holmes said, in *Missouri, Kansas & Texas Ry. v. May*, 194 U. S. 267, 270, in discussing a contention that a Texas statute imposing a certain penalty upon railroads was violative of the "due process of law" clause of the U. S. constitution,

> "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

Appellant concedes this principle in part, in his brief. On page 42 thereof he refers to the presumption of constitutionality, but says that "this presumption is that the facts are such that the legislation is reasonable and it may be rebutted

by showing that the facts are otherwise." We contend that there is no sufficient "showing" in this case to overcome this presumption of constitutionality, and that the judgment of the Supreme Court of Georgia in this habeas corpus case should therefore be sustained.

The closing request of appellant in his brief is that his bail be cancelled. We therefore ask that it be not cancelled but that it be allowed to stand as a valid and enforceable bond.

Respectfully submitted,

M. J. YEOMANS, *Attorney General of Georgia.*

JOHN A. BOYKIN, *Solicitor General.*

J. WALTER LECRAW, *Asst. Solicitor General.*

Atlanta, Georgia,

January 28, 1937.

SUPREME COURT OF THE UNITED STATES.

Nos. 474 and 475.—October Term, 1936.

Angelo Herndon, Appellant, *vs.* J. L. Lowry, Sheriff of Fulton County, Georgia.	Appeals from the Supreme Court of the State of Georgia.

[April 26, 1937.]

Mr. Justice Roberts delivered the opinion of the Court.

The appellant claims his conviction in a state court deprived him of his liberty contrary to the guarantees of the Fourteenth Amendment. He assigns as error the action of the Supreme Court of Georgia in overruling his claim and refusing him a discharge upon *habeas corpus*. The petition for the writ, presented to the Superior Court of Fulton County, asserted the appellant was unlawfully detained by the appellee as sheriff under the supposed authority of a judgment pronouncing him guilty of attempting to incite insurrection, as defined in Section 56 of the Penal Code, and sentencing him to imprisonment for not less than eighteen nor more than twenty years. Attached were copies of the judgment and the indictment and a statement of the evidence upon which the verdict and judgment were founded. The petition alleged the judgment and sentence were void and appellant's detention illegal because the statute under which he was convicted denies and illegally restrains his freedom of speech and of assembly and is too vague and indefinite to provide a sufficiently ascertainable standard of guilt, and further alleged that there had been no adjudication by any court of the constitutional validity of the statute as applied to appellant's conduct. A writ issued. The appellee answered, demurred specially to, and moved to strike, so much of the petition as incorporated the evidence taken at the trial. At the hearing the statement of the evidence was identified and was conceded by the appellee to be full and accurate. The court denied the motion to strike, overruled the special demurrer and an objection to the admission of the trial record, decided that the statute, as construed and applied in the trial of the appellant, did not infringe his liberty of speech and of assembly

but ran afoul of the Fourteenth Amendment because too vague and indefinite to provide a sufficiently ascertainable standard of guilt, and ordered the prisoner's discharge from custody. The appellee took the case to the Supreme Court of Georgia, assigning as error the ruling upon his demurrer, motion, and objection, and the decision against the validity of the statute. The appellant, in accordance with the state practice, also appealed, assigning as error the decision with respect to his right of free speech and of assembly. The two appeals were separately docketed but considered in a single opinion which reversed the judgment on the appellee's appeal and affirmed on that of the appellant,[1] concluding: "Under the pleadings and evidence, which embraced the record on the trial that resulted in the conviction, the court erred, in the habeas-corpus proceeding, in refusing to remand the prisoner to the custody of the officers."

The federal questions presented, and the manner in which they arise, appear from the record of appellant's trial and conviction embodied in the petition, and from the opinions of the State Supreme Court in the criminal proceeding.

At the July Term 1932 of the Superior Court of Fulton County an indictment was returned charging against the appellant an attempt to induce others to join in combined resistance to the lawful authority of the state with intent to deny, to defeat, and to overthrow such authority by open force, violent means, and unlawful acts; alleging that insurrection was intended to be manifested and accomplished by unlawful and violent acts. The indictment specified that the attempt was made by calling and attending public assemblies and by making speeches for the purpose of organizing and establishing groups and combinations of white and colored persons under the name of the Communist Party of Atlanta for the purpose of uniting, combining, and conspiring to incite riots and to embarrass and impede the orderly processes of the courts and offering combined resistance to, and, by force and violence, overthrowing and defeating the authority of the state; that by speech and persuasion, the appellant solicited and attempted to solicit persons to join, confederate with, and become members of the Communist Party and the Young Communist League and introduced into the State and circulated, aided and assisted in introducing and

[1] 182 Ga. 582; 186 S. E. 429.

circulating, booklets, papers, and other writings with the same intent and purpose. The charge was founded on Section 56 of the Penal Code, one of four related sections. Section 55 defines insurrection, Section 56 defines an attempt to incite insurrection, Section 57 prescribes the death penalty for conviction of the offenses described in the two preceding sections unless the jury shall recommend mercy, and Section 58 penalizes, by imprisonment, the introduction and circulation of printed matter for the purpose of inciting insurrection, riot, conspiracy, etc. The sections are copied in the margin.[2]

The appellant was brought to trial and convicted. He appealed on the ground that, under the statute as construed by the trial court in its instructions to the jury, there was no evidence to sustain a verdict of guilty. The Supreme Court affirmed the judgment upon a broader and different construction of the Act.[3] The appellant moved for a rehearing contending, *inter alia*, that, as so construed, the statute violated the Fourteenth Amendment. The court refused to pass upon the constitutional questions thus raised, elaborated and explained its construction of the statute in its original opinion, and denied a rehearing.[4] The appellant perfected an appeal to this court claiming that he had timely raised the federal questions and we, therefore, had jurisdiction to decide them. We held we were without jurisdiction.[5] Upon his commitment to serve his sentence he sought the writ of *habeas corpus*.

In the present proceeding the Superior Court and Supreme Court of Georgia have considered and disposed of the contentions based

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[2] "55. Insurrection shall consist in any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested or intended to be manifested by acts of violence.

"56. Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection.

"57. Any person convicted of the offense of insurrection, or an attempt to incite insurrection, shall be punished with death; or, if the jury recommend to mercy, confinement in the penitentiary for not less than five nor more than 20 years.

"58. If any person shall bring, introduce, print, or circulate, or cause to be introduced, circulated, or printed, or aid or assist, or be in any manner instrumental in bringing, introducing, circulating, or printing within this State any paper, pamphlet, circular, or any writing, for the purpose of inciting insurrection, riot, conspiracy, or resistance against the lawful authority of the State, or against the lives of the inhabitants thereof, or any part of them, he shall be punished by confinement in the penitentiary for not less than five nor longer than 20 years." (Georgia Code, 1933, §§ 26-901 to 26-904, inclusive.)

[3] *Herndon* v. *The State*, 178 Ga. 832; 174 S. E. 597.

[4] *Herndon* v. *The State*, 179 Ga. 597; 176 S. E. 620.

[5] *Herndon* v. *Georgia*, 295 U. S. 441.

upon the federal Constitution. The scope of a *habeas corpus* proceeding in the circumstances disclosed is a state and not a federal question and since the state courts treated the proceeding as properly raising issues of federal constitutional right, we have jurisdiction and all such issues are open here. We must, then, inquire whether the statute as applied in the trial denied appellant rights safeguarded by the Fourteenth Amendment.

The evidence on which the judgment rests consists of appellant's admissions and certain documents found in his possession. The appellant told the state's officers that some time prior to his arrest he joined the Communist Party in Kentucky and later came to Atlanta as a paid organizer for the party, his duties being to call meetings, to educate and disseminate information respecting the party, to distribute literature, to secure members, and to work up an organization of the party in Atlanta; and that he had held or attended three meetings called by him. He made no further admission as to what he did as an organizer, or what he said or did at the meetings. When arrested he carried a box containing documents. After he was arrested he conducted the officers to his room where additional documents and bundles of newspapers and periodicals were found, which he stated were sent him from the headquarters of the Communist Party in New York. He gave the names of persons who were members of the organization in Atlanta, and stated he had only five or six actual members at the time of his apprehension. The stubs of membership books found in the box indicated he had enrolled more members than he stated. There was no evidence that he had distributed any of the material carried on his person and found in his room, or had taken any of it to meetings, save two circulars or appeals respecting county relief which are confessedly innocuous.

The newspapers, pamphlets, periodicals, and other documents found in his room were, so he stated, intended for distribution at his meetings. These the appellee concedes were not introduced in evidence. Certain documents in his possession when he was arrested were placed in evidence. They fall into five classes: first, receipt books showing receipts of small sums of money, pads containing certificates of contributions to the Communist Party's Presidential Election Campaign Fund, receipts for rent of a post office box, and Communist Party membership books; secondly, printed matter consisting of magazines, pamphlets, and copies of the

"Daily Worker", styled the "Central Organ of the Communist Party", and the "Southern Worker", also, apparently, an official newspaper of the party; thirdly, two books, one "Life and Struggles of Negro Toilers", by George Padmore, and the other "Communism and Christianism Analyzed and Contrasted from the Marxian and Darwinian Points of View" by Rt. Rev. William Montgomery Brown, D. D.; fourthly, transcripts of minutes of meetings apparently held in Atlanta; fifthly, two circulars, one of which was prepared by the appellant and both of which had been circulated by him in Fulton County. All of these may be dismissed as irrelevant except those falling within the first and second groups. No inference can be drawn from the possession of the books mentioned, either that they embodied the doctrines of the Communist Party or that they represented views advocated by the appellant. The minutes of meetings contain nothing indicating the purposes of the organization or any intent to overthrow organized government; on the contrary, they indicate merely discussion of relief for the unemployed. The two circulars, admittedly distributed by the appellant, had nothing to do with the Communist Party, its aims or purposes, and were not appeals to join the party but were concerned with unemployment relief in the county and included appeals to the white and negro unemployed to organize and represent the need for further county aid. They were characterized by the Supreme Court of Georgia as "more or less harmless".

The documents of the first class disclose the activity of the appellant as an organizer but, in this respect, add nothing to his admissions.

The matter appearing upon the membership blanks is innocent upon its face however foolish and pernicious the aims it suggests. Under the heading "What is the Communist Party?" this appears:

"The Party is the vanguard of the working class and consists of the best, most class conscious, most active, the most courageous members of that class. It incorporates the whole body of experience of the proletarian struggle, basing itself upon the revolutionary theory of Marxism and representing the general and lasting interests of the whole of the working class, the Party personifies the unity of proletarian principles, of proletarian will and of proletarian revolutionary action.

"We are the Party of the working class. Consequently, nearly the whole of that class (in time of war and civil war, the whole of

that class) should work under the guidance of our Party, should create the closest contacts with our Party."

This vague declaration falls short of an attempt to bring about insurrection either immediately or within a reasonable time but amounts merely to a statement of ultimate ideals. The blanks, however, indicate more specific aims for which members of the Communist Party are to vote. They are to vote Communist for

"1. Unemployment and Social Insurance at the expense of the State and employers.

"2. Against Hoover's wage-cutting policy.

"3. Emergency relief for the poor farmers without restrictions by the government and banks; exemption of poor farmers from taxes and from forced collection of rents or debts.

"4. Equal rights for the Negroes and self-determination for the Black Belt.

"5. Against capitalistic terror: against all forms of suppression of the political rights of the workers.

"6. Against imperialist war; for the defense of the Chinese people and of the Soviet Union."

None of these aims is criminal upon its face. As to one, the 4th, the claim is that criminality may be found because of extrinsic facts. Those facts consist of possession by appellant of booklets and other literature of the second class illustrating the party doctrines. The State contends these show that the purposes of the Communist Party were forcible subversion of the lawful authority of Georgia. They contain, *inter alia*, statements to the effect that the party bases itself upon the revolutionary theory of Marxism, opposes "bosses' wars", approves of the Soviet Union, and desires the "smashing" of the National Guard, the C. M. T. C., and the R. O. T. C. But the State especially relies upon a booklet entitled "The Communist Position on the Negro Question", on the cover of which appears a map of the United States having a dark belt across certain Southern states and the phrase "Self-Determination for the Black Belt". The booklet affirms that the source of the Communist slogan "Right of Self-Determination of the Negroes in the Black Belt" is a resolution of the Communist International on the Negro question in the United States adopted in 1930, which states that the Communist Party in the United States has been actively attempting to win increasing sympathy among the negro population, that certain things have been advocated for the benefit of the Negroes in the Northern

states, but that in the Southern portion of the United States the Communist slogan must be "The Right of Self-Determination of the Negroes in the Black Belt". The resolution defines the meaning of the slogan as

"(a) Confiscation of the landed property of the white landowners and capitalists for the benefit of the negro farmers . . . Without this revolutionary measure, without the argarian revolution, the right of self-determination of the Negro population would be only a Utopia or, at best, would remain only on paper without changing in any way the actual enslavement."

"(b) Establishment of the State Unity of the Black Belt . . . If the right of self-determination of the Negroes is to be put into force, it is necessary wherever possible to bring together into one governmental unit all districts of the South where the majority of the settled population consists of negroes . . ."

"(c) Right of Self-Determination. This means complete and unlimited right of the negro majority to exercise governmental authority in the entire territory of the Black Belt, as well as to decide upon the relations between their territory and other nations, particularly the United States . . . First of all, true right of self-determination means that the negro majority and not the white minority in the entire territory of the administratively united Black Belt exercises the right of administering governmental, legislative, and judicial authority. At the present time all this power is concentrated in the hands of the white bourgeoisie and landlords. It is they who appoint all officials, it is they who dispose of public property, it is they who determine the taxes, it is they who govern and make the laws. Therefore, the overthrow of this class rule in the Black Belt is unconditionally necessary in the struggle for the negroes' right to self-determination. This, however, means at the same time the overthrow of the yoke of American imperialism in the Black Belt on which the forces of the local white bourgeoisie depend. Only in this way, only if the negro population of the Black Belt wins its freedom from American imperialism even to the point of deciding itself the relations between its country and other governments, especially the United States, will it win real and complete self-determination. One should demand from the beginning that no armed forces of American imperialism should remain on the territory of the Black Belt."

Further statements appearing in the pamphlet are:

"Even if the situation does not yet warrant the raising of the question of uprising, one should not limit oneself at present to propaganda for the demand 'Right to Self-Determination', but should organize mass actions, such as demonstrations, strikes, tax boycott movements, etc."

"One cannot deny that it is just possible for the negro population of the Black Belt to win the right to self-determination during capitalism; but it is perfectly clear and indubitable that this is possible only through successful revolutionary struggle for power against the American bourgeoisie, through wresting the negroes' right of self-determination from American imperialism. Thus, the slogan of right to self-determination is a real slogan of National Rebellion which, to be considered as such, need not be supplemented by proclaiming struggle for the complete separation of the negro zone, at least not at present."

There is more of the same purport, particularly references to the "revolutionary trade unions in the South", "revolutionary struggle against the ruling white bourgeoisie", and "revolutionary program of the Communist Party".

There is no evidence the appellant distributed any writings or printed matter found in the box he carried when arrested, or any other advocating forcible subversion of governmental authority. There is no evidence the appellant advocated, by speech or written word, at meetings or elsewhere, any doctrine or action implying such forcible subversion. There is evidence tending to prove that the appellant held meetings for the purpose of recruiting members of the Communist Party and solicited contributions for the support of that party and there is proof of the doctrines which that party espouses. Appellant's intent to incite insurrection, if it is to be found, must rest upon his procuring members for the Communist Party and his possession of that party's literature when he was arrested.

Section 55 of the Georgia Penal Code defines insurrection as "combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested or intended to be manifested by acts of violence."[6] The appellant was not indicted under this section. Section 58 denounces the introduction, printing, or circulation, or assisting to print or circulate any document "for the purpose of inciting insurrection". The appellant was not indicted under this section.

Section 56, under which the indictment is laid, makes no reference to force or violence except by the phrase "combined resistance to the lawful authority of the State". The Supreme Court evidently importing from the similar phraseology in Section 55 the additional element contained in that section, namely, "mani-

[6] Note 2, *supra*.

fested or intended to be manifested by acts of violence", has decided that intended resort to force is an essential element of the offense defined by Section 56.

To ascertain how the Act is held to apply to the appellant's conduct we turn to the rulings of the state courts in his case. The trial court instructed the jury: "In order to convict the defendant, . . . it must appear clearly by the evidence that immediate serious violence against the State of Georgia was to be expected or advocated." The jury rendered a verdict of guilty. In the Supreme Court the appellant urged that the evidence was wholly insufficient to sustain the verdict under the law as thus construed. That court sustained the conviction by construing the statute thus:

"Force must have been contemplated, but, as said above, the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. . . . Nor, would it be necessary to guilt, that the alleged offender should have, intended that an insurrection should follow instantly or at any given time, but it would be sufficient that he intended it to happen at any time, as a result of his influence, by those whom he sought to incite."[7]

Upon application for rehearing the court further elaborated its views as to the meaning of the statute:

"Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce . . . ."[8]

The affirmance of conviction upon the trial record necessarily gives Section 56 the construction that one who seeks members for or attempts to organize a local unit of a party which has the purposes and objects disclosed by the documents in evidence may be found guilty of an attempt to incite insurrection.

The questions are whether this construction and application of the statute deprives the accused of the right of freedom of speech

[7] 178 Ga. 855, 174 S. E. 597.
[8] 179 Ga. 600, 176 S. E. 622.

and of assembly guaranteed by the Fourteenth Amendment, and whether the statute so construed and applied furnishes a reasonably definite and ascertainable standard of guilt.

The appellant, while admitting that the people may protect themselves against abuses of the freedom of speech safeguarded by the Fourteenth Amendment by prohibiting incitement to violence and crime insists that legislative regulation may not go beyond measures forefending against "clear and present danger" of the use of force against the state. For this position he relies upon our decisions under the Federal Espionage Acts[9] and cognate state legislation. These made it criminal wilfully to cause or to attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States or wilfully to obstruct or attempt to obstruct the recruiting or enlistment service of the United States or to conspire for these purposes. We sustained the power of the government or a state to protect the war operations of the United States by punishing intentional interference with them. We recognized, however, that words may be spoken or written for various purposes and that wilful and intentional interference with the described operations of the government might be inferred from the time, place, and circumstances of the act. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[10]

The legislation under review differs radically from the Espionage Acts in that it does not deal with a wilful attempt to obstruct a described and defined activity of the government.

The State, on the other hand, insists that our decisions uphold state statutes making criminal utterances which have a "dangerous tendency" towards the subversion of government. It relies particularly upon *Gitlow* v. *New York*, 268 U. S. 652. There, however, we dealt with a statute which, quite unlike Section 56 of the

[9] Act of June 15, 1917, c. 30, 40 Stat. 217, 219; amended by Act of May 16, 1918, c. 75, 40 Stat. 553.

[10] See *Schenck* v. *United States*, 249 U. S. 47, 52; *Frohwerk* v. *United States*, 249 U. S. 204; *Debs* v. *United States*, 249 U. S. 211; *Abrams* v. *United States*, 250 U. S. 616; *Schaefer* v. *United States*, 251 U. S. 466; *Pierce* v. *United States*, 252 U. S. 239; *O'Connell* v. *United States*, 253 U. S. 142; *State* v. *Holm*, 139 Minn. 267; *Gilbert* v. *Minnesota*, 254 U. S. 325.

Georgia Criminal Code, denounced as criminal certain acts carefully and adequately described. We said:

"And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means." (p. 668.)

"By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. *Mugler* v. *Kansas*, 123 U. S. 623, 661. And the case is to be considered 'in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare;' and that its police 'statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the State in the public interest.'" (p. 668.)

And it was in connection with the statute there involved that the court quoted language relied upon below and in argument here from *People* v. *Lloyd*, 304 Ill. 23, to the effect that a state is not compelled to delay adoption of such preventive measures until the apprehended danger becomes certain. Out of excess of caution the distinction was again clearly drawn between acts of the order of the Espionage Act and the New York act under review.

" . . . when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

"It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any

previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection." (pp. 670-671.)

It is evident that the decision sustaining the New York statute furnishes no warrant for the appellee's contention that under a law general in its description of the mischief to be remedied and equally general in respect of the intent of the actor, the standard of guilt may be made the "dangerous tendency" of his words.

The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution. If, therefore, a state statute penalize innocent participation in a meeting held with an innocent purpose merely because the meeting was held under the auspices of an organization membership in which, or the advocacy of whose principles, is also denounced as criminal, the law, so construed and applied, goes beyond the power to restrict abuses of freedom of speech and arbitrarily denies that freedom.[11] And, where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence or on the other hand may be said or done with a purpose violently to subvert government, a conviction under such a law cannot be sustained. Upon this view we held bad a statute of California providing that "Any person who displays a red flag, . . . in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government . . . is guilty of a felony."[12]

After pointing out that peaceful agitation for a change of our form of government is within the guaranteed liberty of speech, we said of the act in question: "A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to

[11] *DeJonge* v. *Oregon*, No. 123, October Term, 1936.
[12] *Stromberg* v. *California*, 283 U. S. 359.

the guaranty of liberty contained in the Fourteenth Amendment". (p. 369.)

1. The appellant had a constitutional right to address meetings and organize parties unless in so doing he violated some prohibition of a valid statute. The only prohibition he is said to have violated is that of Section 56 forbidding incitement or attempted incitement to insurrection by violence. If the evidence fails to show that he did so incite, then, as applied to him, the statute unreasonably limits freedom of speech and freedom of assembly and violates the Fourteenth Amendment. We are of opinion that the requisite proof is lacking. From what has been said above with respect to the evidence offered at the trial it is apparent that the documents found upon the appellant's person were certainly, as to some of the aims stated therein, innocent and consistent with peaceful action for a change in the laws or the constitution. The proof wholly fails to show that the appellant had read these documents; that he had distributed any of them; that he believed and advocated any or all of the principles and aims set forth in them, or that those he had procured to become members of the party knew or approved of any of these documents.

Thus, the crucial question is not the formal interpretation of the statute by the Supreme Court of Georgia but the application given it. In its application the offense made criminal is that of soliciting members for a political party and conducting meetings of a local unit of that party when one of the doctrines of the party, established by reference to a document not shown to have been exhibited to anyone by the accused, may be said to be ultimate resort to violence at some indefinite future time against organized government. It is to be borne in mind that the legislature of Georgia has not made membership in the Communist Party unlawful by reason of its supposed dangerous tendency even in the remote future. The question is not whether Georgia might, in analogy to what other states have done, so declare.[13] The appellant induced others to become members of the Communist Party. Did he thus incite to insurrection by reason of the fact that they agreed to abide by the tenets of the party, some of them lawful, others, as may be assumed, unlawful, in the absence of proof that he brought the unlawful aims to their notice, that he approved them, or that the fantastic pro-

[13] See the statutes drawn in question in *Gitlow* v. *New York*, 268 U. S. 652, at 654, and in *Whitney* v. *California*, 274 U. S. 357, 359.

gram they envisaged was conceived of by anyone as more than an ultimate ideal? Doubtless circumstantial evidence might affect the answer to the question if appellant had been shown to have said that the Black Belt should be organized at once as a separate state and that that objective was one of his principal aims. But here circumstantial evidence is all to the opposite effect. The only objectives appellant is proved to have urged are those having to do with unemployment and emergency relief which are void of criminality. His membership in the Communist Party and his solicitation of a few members wholly fails to establish an attempt to incite others to insurrection. Indeed, so far as appears, he had but a single copy of the booklet the State claims to be objectionable; that copy he retained. The same may be said with respect to the other books and pamphlets, some of them of more innocent purport. In these circumstances, to make membership in the party and solicitation of members for that party a criminal offense, punishable by death, in the discretion of a jury, is an unwarranted invasion of the right of freedom of speech.

2. The statute, as construed and applied in the appellant's trial, does not furnish a sufficiently ascertainable standard of guilt. The Act does not prohibit incitement to violent interference with any given activity or operation of the state. By force of it, as construed, the judge and jury trying an alleged offender cannot appraise the circumstances and character of the defendant's utterances or activities as begetting a clear and present danger of forcible obstruction of a particular state function. Nor is any specified conduct or utterance of the accused made an offense.

The test of guilt is thus formulated by the Supreme Court of the state. Forcible action must have been contemplated but it would be sufficient to sustain a conviction if the accused intended that an insurrection "should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce." If the jury conclude that the defendant should have contemplated that any act or utterance of his in opposition to the established order or advocating a change in that order, might, in the distant future, eventuate in a combination to offer forcible resistance to the State, or as the State says, if the jury believe he should have known that his words would have "a dangerous tendency" then he may be convicted. To be guilty under the law, as con-

strued, a defendant need not advocate resort to force. He need not teach any particular doctrine to come within its purview. Indeed, he need not be active in the formation of a combination or group if he agitate for a change in the frame of government, however peaceful his own intent. If, by the exercise of prophesy, he can forecast that, as a result of a chain of causation, following his proposed action a group may arise at some future date which will resort to force, he is bound to make the prophesy and abstain, under pain of punishment, possibly of execution. Every person who attacks existing conditions, who agitates for a change in the form of government, must take the risk that if a jury should be of opinion he ought to have foreseen that his utterances might contribute in any measure to some future forcible resistance to the existing government he may be convicted of the offense of inciting insurrection. Proof that the accused in fact believed that his effort would cause a violent assault upon the state would not be necessary to conviction. It would be sufficient if the jury thought he reasonably might foretell that those he persuaded to join the party might, at some time in the indefinite future, resort to forcible resistance of government. The question thus proposed to a jury involves pure speculation as to future trends of thought and action. Within what time might one reasonably expect that an attempted organization of the Communist Party in the United States would result in violent action by that party? If a jury returned a special verdict saying twenty years or even fifty years the verdict could not be shown to be wrong. The law, as thus construed, licenses the jury to create its own standard in each case. In this aspect what was said in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, is particularly apposite:

"Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury . . ." (p. 89.)

The decisions relied on by the State held the Sherman Law furnished a reasonable standard of guilt because it made a standard long recognized by the common law the statutory test.[14]

The statute, as construed and applied, amounts merely to a drag-net which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[14] *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *Nash* v. *United States*, 229 U. S. 373.

SUPREME COURT OF THE UNITED STATES.

Nos. 474 and 475.—October Term, 1936.

Angelo Herndon, Appellant,
vs.
J. I. Lowry, Sheriff of Fulton County, Georgia.

Appeals from the Supreme Court of Georgia.

[April 26, 1937.]

Mr. Justice Van Devanter, dissenting.

I am of opinion that the Georgia statute, as construed and applied by the supreme court of the State in Herndon's case, prescribes a reasonably definite and ascertainable standard by which to determine the guilt or innocence of the accused, and does not encroach on his right of freedom of speech or of assembly.

It plainly appears, I think, that the offense defined in the statute, and of which Herndon was convicted, was not that of advocating a change in the state government by lawful means, such as an orderly exertion of the elective franchise or of the power to amend the state constitution, but was that of attemping to induce and incite others to join in combined *forcible* resistance to the lawful authority of the State.

Sections 55, 56 and 57 of the Penal Code of Georgia[1] deal with insurrection, attempts to incite insurrection, and the punishment therefor, and are so closely related that all evidently have a bearing on the scope and meaning of any one of them. Section 55 denounces insurrection and defines it as "any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested or intended to be manifested by acts of violence". Section 56 denounces an attempt to incite insurrection and defines it as "any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State". Section 57 prescribes the punishment for each of these offenses.

While § 56 does not in direct terms include force or violence as a feature of the "combined resistance to the lawful authority of

[1] Georgia Code 1933, §§ 26-901, 26-902, 26-903.

the State" the attempt to induce which it denounces, the supreme court of the State has construed the section, doubtless by reason of its relation to the others, as making intended resort to force or violence an essential element of such "combined resistance".[2] Therefore the section must be taken as if expressly embodying this construction. It was under § 56 that Herndon was indicted, tried and convicted.

By the indictment he was charged with attempting to induce others to join in combined resistance to the lawful authority of the State "by open force and by violent means, and by unlawful acts", the modes of attempted inducement being specified. Upon the trial the court instructed the jury that neither "possession of literature insurrectionary in its nature" nor "engaging in academic or philosophical discussion of abstract principles of economics or political or other subjects, however radical or revolutionary in their nature", would warrant a conviction; and that a verdict of guilt could not be given unless it clearly appeared from the evidence that "immediate serious violence against the State" was expected or advocated by the accused.

In affirming the conviction the supreme court of the State held that under the statute "force must have been contemplated", but that it is not necessary to guilt that the accused "should have intended that an insurrection should follow instantly or at any given time, but it would be sufficient that he intended it to happen at any time, as a result" of his persuasion—the intent of the statute being "to arrest at its incipiency any effort to overthrow the state government, where it takes the form of an actual attempt to incite others to insurrection".

Then, coming to consider the sufficiency of the evidence, the supreme court stated: "From what has been said, the question here is simply this: did the evidence show that the defendant made any attempt to induce others to come together in any combined *forcible* resistance to the lawful authority of the State?" And the court concluded its consideration of this question by saying, "The jury were amply authorized to infer that *violence* was intended and that the defendant did attempt to induce others to combine in *such* resistance to the lawful authority of the State" (Italics supplied).[3]

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[2] Carr v. State, 176 Ga. 747; Herndon v. State, 178 Ga. 832, 855.

[3] Herndon v. State, 178 Ga. 832, 855, 867.

The accused sought a rehearing, largely because of his understanding of what was said in the court's opinion respecting the expected time of the intended resort to force. A rehearing was denied, and in that connection the court said:[4]

"The language used by this court should be considered with the usual reasonable implications. The phrase 'at any time,' as criticized in the motion for rehearing, was not intended to mean at any time in the indefinite future, or at any possible later time, however remote. An activity now could hardly be expected to be the direct producing cause of an insurrection after the lapse of a great period of time, and it was not the purpose of this court to suggest that as to the mental requisite any such intent would be a sufficient ingredient of an attempt to incite an insurrection. On the contrary the phrase 'at any time' was necessarily intended, and should have been understood, to mean within a reasonable time; that is, within such time as one's persuasion or other adopted means might reasonably be expected to be directly operative in causing an insurrection. Accordingly, the statements by this court as quoted in the motion for rehearing are to be accepted in the following sense: *Force must have been contemplated*, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce. This statement, considered with what was said in the original decision, represents the view of this court as to the proper construction of the statute under consideration; *and under the statute as thus interpreted, we say, as before, that the evidence was sufficient to authorize the conviction.* In view of what has been said above, it would seem that all contentions made in the motion for rehearing should necessarily fail, based, as they are, upon an erroneous construction of our decision." (Italics supplied.)

It thus is made quite plain that the case proceeded from beginning to end, and in both state courts, upon the theory that the offense denounced by the statute and charged in the indictment was that of attempting to induce and incite others to join in combined *forcible* resistance to the lawful authority of the State; that the jury returned a verdict of guilty upon that theory; and that it

[4] Herndon v. State, 179 Ga. 597, 599.

was upon the same theory that the supreme court held the jury's verdict was supported by the evidence, and affirmed the conviction.

The present appeal is not from that judgment of affirmance but from a judgment denying a subsequent petition for habeas corpus.[2]

If it be assumed that on this appeal the evidence produced on the trial in the criminal case may be examined to ascertain how the statute was applied, I am of opinion, after such an examination, that the statute was applied as if the words "combined resistance" therein were in letter and meaning "combined forcible resistance".

The evidence, all of which is embodied in the present record, will be here stated in reduced volume without omitting anything material.

Herndon is a negro and a member of the Communist Party of the U. S. A., which is a section of the Communist International. He was sent from Kentucky to Atlanta, Georgia, as a paid organizer for the party. Atlanta is within an area where there is a large negro population, and the Communist Party has been endeavoring to extend its activities and membership to that population among others. Herndon's duties as an organizer were to call and conduct meetings, to disseminate information respecting the party, to distribute its literature, to educate prospects and secure members, to receive dues and contributions, and to work up a subordinate organization of the party. He called and conducted meetings which evidently were secret, solicited and secured members, and received dues and contributions. He and others, when becoming members, subscribed to an obligation saying "The undersigned declares his adherence to the program and statutes of the Communist International and the Communist Party of the U. S. A., and agrees to submit to the discipline of the party and to engage actively in its work".

When arrested he had under his arm a box in which he was carrying membership and collection books which he had been using and various pamphlets, books and documents, all pertaining to the structure, purposes and activities of the party. Two or three of the papers had been prepared by him and disclosed that he was an active spirit in the "Section Committee" and the "Unemployment Committee", both subordinate local agencies of the party. The member-

[2] Lowry, Sheriff, v. Herndon, 182 Ga. 562.

ship books, besides showing names of those whom he had induced to become members and dates of their admission, contained extracts from the party statutes, some of which read:

"A member of the Party can be every person from the age of eighteen up who accepts the program and statutes of the Communist International and the Communist Party of the U. S. A., who becomes a member of a basic organization of the Party, who is active in this organization, who subordinates himself to all decisions of the Comintern and of the Party, and regularly pays his membership dues."

"The strictest Party Discipline is the most solemn duty of all Party members and all Party organizations. The decisions of the CI and the Party Convention of the CC and of all leading committees of the Party, must be promptly carried out. Discussion of questions over which there have been differences must not continue after the decision has been made."

"The Party is the vanguard of the working class and consists of the best, most class conscious, most active, the most courageous members of that class. It incorporates the whole body of experience of the proletarian struggle, basing itself upon the *revolutionary theory of Marxism* and representing the general and lasting interests of the whole of the working class. The Party personifies the unity of proletarian principles, of proletarian will and of proletarian revolutionary action."

The collection books contained the statement "Every dollar collected is a bullet fired into the boss class".

The membership and collection books had been sent to Herndon from the main office of the party in New York for use by him, and he had been using them in securing members and in collecting dues and contributions. With the exception of two or three papers prepared by him and heretofore mentioned, the literature which he was carrying under his arm when arrested had been sent to him from the same office, together with many pamphlets, books and other publications, for use and distribution by him in his work as an organizer. The literature which he had with him when arrested was produced in evidence and will now be described, chiefly by titles and extracts (italics supplied).

"Appeal to Southern Young Workers".

"The Young Communist League is the champion not only of the young white workers but especially of the doubly oppressed negro young workers. The Young Communist League fights against the whole system of race discrimination and stands for full racial, political, economic and social equality of all workers.

The chief aim of the Young Communist League is to organize the young workers for a struggle against the bosses and against the whole profit system.

. . . . . .

The Young Communist League fights for:

. . . . . .

Full political, social and racial equality for the negro workers.
Against bosses' wars! Defend the Soviet Union!
Smash the National Guard, the C. M. T. C. and R. O. T. C."

"LIFE AND STRUGGLES OF NEGRO TOILERS".

"In no other so-called civilized country in the world are human beings treated as badly as these 15 million negroes [in the United States]. They live under a perpetual regime of white terror. . . . They are absolutely at the mercy of every fiendish mob incited by the white landlords and capitalists".

"COMMUNISM AND CHRISTIANISM".

"Banish the Gods from the Skies and Capitalists from the Earth and make the World safe for Industrial Communism.

. . . . . .

"The trouble with every reformatory socialism of modern times is, that it undertakes the impossibility of changing the fruit of the capitalist state into that of the communistic one, without changing the political organism; but to do that is as impossible as to gather grapes from thorns or figs from thistles. Hence an uprooting and replanting are necessary (*a revolution not a reformation*) which will give the world a new tree of state.

"Capitalism no longer grows the fruits (foods, clothes and houses) which are necessary to the sustenance of all the world. Hence it must be *dug up by the roots* in order that a tree which is so organized that it will bear these necessities for the whole world may be *planted in its place.*

"The people of Russia have accomplished this *uprooting and replanting* (this *revolution*) in the case of their state, and those of every nation are destined to do the same in one way or another, each according to its historical and economic development, *some with much violence, most, I hope, with but little.*"

"COMMUNIST POSITION ON THE NEGRO QUESTION".

This is a booklet of several pages and bears on the front of its cover a map of the United States showing a dark belt stretching across considerable portions of Georgia and eight other southern states. Parts of the text are here copied.

"The slogan of the right of self-determination occupies the central place in the liberation struggle of the Negro population in the

Black Belt against the yoke of American imperialism. But this slogan, as we see it, must be carried out only in connection with two other basic demands. Thus, there are three basic demands to be kept in mind in the Black Belt, namely, the following:

(a) *Confiscation of the landed property of the white landowners and capitalists for the benefit of the negro farmers.* The land property in the hands of the white American exp' ters constitutes the most important material basis of the entire system of national oppression and serfdom of the Negroes in the Black Belt. More than three-quarters of all Negro farmers here are bou d in actual serfdom to the farms and plantations of the white exploiters by the feudal system of 'share cropping'.

. . . . . .

Without this *revolutionary measure*, without the *agrarian revolution*, the right of self-determination of the Negro population would be only a Utopia, or, at best, would remain only on paper without changing in any way the actual enslavement.

(b) Establishment of the State Unity of the Black Belt. At the present time this Negro zone—precisely for the purpose of facilitating national oppression—is artificially split up and divided into a number of various states which include distant localities having a majority of white population. If the right of self-determination of the Negroes is to be put into force, it is necessary wherever possible to bring together into one governmental unit all districts of the South where the majority of the settled population consists of negroes. Within the limits of this state there will of course remain a fairly significant white minority which must submit to the right of self-determination of the negro majority. . . .

(c) Right of Self-Determination. This means complete and unlimited right of the negro majority to exercise governmental authority in the entire territory of the Black Belt, as well as to decide upon the relations *between their territory and other nations, particularly the United States*".

. . . . . .

"Even if the situation does not yet warrant the raising of the question of uprising, one should not limit oneself at present to propaganda for the demand, 'Right to Self-Determination,' but should *organize mass actions, such as demonstrations, strikes, tax boycott movements*, etc."

. . . . . .

"A direct question of power is also the demand of *confiscation* of the land of the white exploiters in the South, as well as the demand of the negroes that the entire Black Belt be amalgamated into a State unit.

"Hereby, every single fundamental demand of the liberation struggle of the negroes in the Black Belt is such that—if once

thoroughly understood by the negro masses and adopted as their slogan—it will lead them into the struggle for the overthrow of the power of the ruling bourgeoisie, which is impossible without such revolutionary struggle. One cannot deny that it is just possible for the negro population of the Black Belt to win the right to self-determination during capitalism; but it is perfectly clear and indubitable that this is possible only through *successful revolutionary struggle* for power against the American bourgeoisie, through *wresting* the negroes' right of self-determination *from American imperialism*. Thus, the slogan of right to self-determination is a real slogan of *National Rebellion* which, to be considered as such, need not be supplemented by proclaiming struggle for the complete separation of the negro zone, at least not at present.

"(d) Communists must fight in the forefront of the national liberation movement and must do their utmost for the progress of this mass movement and its revolutionization. Negro Communists must clearly dissociate themselves from all bourgeois currents in the negro movement, must indefatigably oppose the spread of the influence of the bourgeois groups on the working negroes".

. . . . . .

"Their constant call to the negro masses must be: *Revolutionary struggle* against the ruling white bourgeoisie, through a *fighting alliance* with the *revolutionary* white proletariat!

. . . . . .

"We are Bolsheviks, members of a fighting Party of the working class, who know that the only road to the *revolutionary overthrow* of capitalism and the establishment of Communism is through welding together the iron unity of class idealogy which penetrates into our ranks, as the prerequisite to the *effective struggle* against the class enemy *physically.*"

There was no direct testimony that Herndon distributed the literature just described. No member of the Communist Party came forward to tell what he did in their meetings or in inducing them to become members. Nor does this seem strange when regard is had to the obligation taken by members and to the discipline imposed. Nevertheless there was evidence from which distribution by him reasonably could be inferred. It was shown that he was an active member, was sent to Atlanta as a paid organizer, and was subject to party discipline; also that he received the literature for distribution in the course of his work and had copies of it, together with current membership and collection books, under his arm when he was arrested; and further that he had been soliciting and securing members, which was part of the work in which the literature

was to be used. He had declared his "adherence to the program and statutes" of the party and had taken like declarations from those whom he secured as members; and this tended strongly to show not only that he understood the party program and statutes as outlined in the literature but also that he brought them to the attention of others whom he secured as members. Besides, at the trial he made an extended statement to the court and jury in his defense,[6] but did not refer in any wise to the literature or deny that he had been using or distributing it. Thus there was in the evidence not merely some but adequate and undisputed basis for inferring that he had been using the literature for the purposes for which he received it. Evidently, and with reason, the jury drew this inference.

It should not be overlooked that Herndon was a negro member and organizer in the Communist Party and was engaged actively in inducing others, chiefly southern negroes, to become members of the party and participate in effecting its purposes and program. The literature placed in his hands by the party for that purpose was particularly adapted to appeal to negroes in that section, for it pictured their condition as an unhappy one resulting from asserted wrongs on the part of white landlords and employers, and sought by alluring statements of resulting advantages to induce them to join in an effort to carry into effect the measures which the literature proposed. These measures included a revolutionary uprooting of the existing capitalist state, as it was termed; confiscation of the landed property of white landowners and capitalists for the benefit of negroes; establishment in the black belt of an independent State, possibly followed by secession from the United States; organization of mass demonstrations, strikes and tax boycotts in aid of this measure; adoption of a fighting alliance with the revolutionary white proletariat; revolutionary overthrow of capitalism and establishment of Communism through effective physical struggles against the class enemy. Proposing these measures was nothing short of advising a resort to force and violence, for all know that such measures could not be effected otherwise. Not only so, but the literature makes such repelling use of the terms "revolution", "national rebellion", "revolutionary struggle", "revolutionary overthrow", "effective physical struggle", "smash the National Guard", "mass strikes", and "violence", as to leave no doubt that the use of force in an unlawful sense is intended.

[6] See Georgia Code 1933, § 38-415.

The purpose and probable effect of such literature, when under consideration in a prosecution like that against Herndon, are to be tested and determined with appropriate regard to the capacity and circumstances of those who are sought to be influenced.[7] In this instance the literature is largely directed to a people whose past and present circumstances would lead them to give unusual credence to its inflaming and inciting features.

And so it is that examination and consideration of the evidence convince me that the supreme court of the State applied the statute, conformably to its opinion, as making criminal an attempt to induce and incite others to join in combined *forcible* resistance to the lawful authority of the State.

That the constitutional guaranty of freedom of speech and assembly does not shield or afford protection for acts of intentional incitement to forcible resistance to the lawful authority of a State is settled by repeated decisions of this Court;[8] and the Georgia decisions are to the same effect.[9]

Under the statute as construed and applied it is essential that the accused intended to induce combined forcible resistance. The presence of the intent aggravates the inducement and brings it more certainly within the power of the State to denounce it as a crime than otherwise it would be. The supreme court of the State in both of its opinions was dealing with a statute and a charge in which the intent of the accused was an element of the offense. In the original opinion the court incautiously said "it would be sufficient that he intended it [the combined and forcible resistance] to happen at any time". In its opinion on rehearing it said the phrase "at any time" had not been intended to mean any time in the indefinite future; and by way of avoiding such a meaning the court changed that part of the original opinion by making it read "at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce". I do not perceive that this puts the standard of guilt at large or renders it inadmissibly vague. The accused must intend that combined *forcible* resistance shall proxi-

[7] Burns v. United States, 274 U. S. 328, 335.

[8] Gitlow v. New York, 268 U. S. 652, 666, *et seq.*; Whitney v. California, 274 U. S. 357, 371; Fiske v. Kansas, 274 U. S. 380, 385; Stromberg v. Minnesota, 283 U. S. 359, 368; Near v. Minnesota, 283 U. S. 697, 708.

[9] Carr v. State, 176 Ga. 55; Carr v. State, 176 Ga. 747.

mately result from his act of inducement. There is no uncertainty in that. The intended point of time must be within the period during which he "might reasonably expect" his inducement to remain *directly* operative in causing the combined forcible resistance. The words "might reasonably expect" have as much precision as is admissible in such a matter, are not difficult to understand, and conform to decisions heretofore given by this Court in respect of related questions.[10] I therefore am of opinion that there is no objectionable uncertainty about the standard of guilt and that the statute does not in that regard infringe the constitutional guaranty of due process of law.

Believing that the statute under which the conviction was had is not subject to the objections leveled against it, I think the judgment of the supreme court of the State denying the petition for habeas corpus should be affirmed.

Mr. Justice McREYNOLDS, Mr. Justice SUTHERLAND and Mr. Justice BUTLER join in this dissent.

[10] Waters Pierce Oil Co. *v.* Texas, 212 U. S. 86, 108-111; Nash *v.* United States, 229 U. S. 373, 376-378.